

**PRESIDENTIAL CAMPAIGN ACTIVITIES OF 1972**  
**SENATE RESOLUTION 60**

---

**APPENDIX TO THE HEARINGS**  
**OF THE**  
**SELECT COMMITTEE ON**  
**PRESIDENTIAL CAMPAIGN ACTIVITIES**  
**OF THE**  
**UNITED STATES SENATE**  
**NINETY-THIRD CONGRESS**  
**FIRST AND SECOND SESSIONS**

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**LEGAL DOCUMENTS RELATING TO THE**  
**SELECT COMMITTEE HEARINGS**

WASHINGTON, D.C.

**PART I**



JUNE 28, 1974

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Select Committee on Presidential Campaign Activities

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# SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES

(Established by S. Res. 60, 93d Congress, 1st Session)



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\*/ This litigation also related to the request for an immunity order for John W. Dean III. The papers that relate specifically to Mr. Dean are omitted to avoid duplication.

\*\*/ This litigation also related to the request for an immunity order for Gordon Strachan. The papers that relate specifically to Mr. Strachan are omitted to avoid duplication.

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# **I. Committee Resolutions, Rules of Procedure and Guidelines**



93<sup>D</sup> CONGRESS  
1<sup>ST</sup> SESSION

# S. RES. 60

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## IN THE SENATE OF THE UNITED STATES

FEBRUARY 5, 1973

Mr. ERVIN (for himself and Mr. MANSFIELD) submitted the following resolution; which was ordered to be placed on the calendar.

FEBRUARY 7, 1973

Considered, amended, and agreed to

[Omit the part struck through and insert the part printed in italic]

---

## RESOLUTION

To establish a select committee of the Senate to conduct an investigation and study of the extent, if any, to which illegal, improper, or unethical activities were engaged in by any persons, acting individually or in combination with others, in the presidential election of 1972, or any campaign, canvass, or other activity related to it.

1      *Resolved,*

2      SECTION 1. (a) That there is hereby established a  
3 select committee of the Senate, which may be called, for  
4 convenience of expression, the Select Committee on Presi-  
5 dential Campaign Activities, to conduct an investigation and  
6 study of the extent, if any, to which illegal, improper, or  
7 unethical activities were engaged in by any persons, acting

VII—O

1 either individually or in combination with others, in the  
2 presidential election of 1972, or in any related campaign or  
3 canvass conducted by or in behalf of any person seeking  
4 nomination or election as the candidate of any political party  
5 for the office of President of the United States in such elec-  
6 tion, and to determine whether in its judgment any occur-  
7 rences which may be revealed by the investigation and study  
8 indicate the necessity or desirability of the enactment of new  
9 congressional legislation to safeguard the electoral process  
10 by which the President of the United States is chosen.

11 (b) The select committee created by this resolution shall  
12 consist of ~~five~~ *seven* Members of the Senate, ~~three~~ *four* of  
13 whom shall be appointed by the President of the Senate  
14 from the majority Members of the Senate upon the recom-  
15 mendation of the majority leader of the Senate, and ~~two~~  
16 *three* of whom shall be appointed by the President of the  
17 Senate from the minority Members of the Senate upon the  
18 recommendation of the minority leader of the Senate. For  
19 the purposes of paragraph 6 of rule XXV of the Standing  
20 Rules of the Senate, service of a Senator as a member, chair-  
21 man, or vice chairman of the select committee shall not be  
22 taken into account.

23 (c) The select committee shall select a chairman and  
24 vice chairman from among its members, and adopt rules of  
25 procedure to govern its proceedings. The vice chairman shall  
26 preside over meetings of the select committee during the



1 absence of the chairman, and discharge such other responsi-  
2 bilities as may be assigned to him by the select committee or  
3 the chairman. Vacancies in the membership of the select com-  
4 mittee shall not affect the authority of the remaining mem-  
5 bers to execute the functions of the select committee and  
6 shall be filled in the same manner as original appointments  
7 to it are made.

8 (d) A majority of the members of the select committee  
9 shall constitute a quorum for the transaction of business, but  
10 the select committee may fix a lesser number as a quorum  
11 for the purpose of taking testimony or depositions.

12 SEC. 2. That the select committee is authorized and  
13 directed to do everything necessary or appropriate to make  
14 the investigation and study specified in section 1 (a) . With-  
15 out abridging or limiting in any way the authority conferred  
16 upon the select committee by the preceding sentence, the  
17 Senate further expressly authorizes and directs the select  
18 committee to make a complete investigation and study of the  
19 activities of any and all persons or groups of persons or orga-  
20 nizations of any kind which have any tendency to reveal the  
21 full facts in respect to the following matters or questions:

22 (1) The breaking, entering, and bugging of the  
23 headquarters or offices of the Democratic National Com-  
24 mittee in the Watergate Building in Washington, District  
25 of Columbia;

1           (2) The monitoring by bugging, eavesdropping,  
2       wiretapping, or other surreptitious means of conversa-  
3       tions or communications occurring in whole or in part in  
4       the headquarters or offices of the Democratic National  
5       Committee in the Watergate Building in Washington,  
6       District of Columbia;

7           (3) Whether or not any printed or typed or written  
8       document or paper or other material was surreptitiously  
9       removed from the headquarters or offices of the Demo-  
10      cratic National Committee in the Watergate Building in  
11      Washington, District of Columbia, and thereafter copied  
12      or reproduced by photography or any other means for  
13      the information of any person or political committee or  
14      organization;

15          (4) The preparing, transmitting, or receiving by  
16      any person for himself or any political committee or  
17      any organization of any report or information concern-  
18      ing the activities mentioned in subdivision (1), (2),  
19      or (3) of this section, and the information contained in  
20      any such report;

21          (5) Whether any persons, acting individually or  
22      in combination with others, planned the activities men-  
23      tioned in subdivision (1), (2), (3), or (4) of this  
24      section, or employed any of the participants in such  
25      activities to participate in them, or made any payments

1 or promises of payments of money or other things of  
2 value to the participants in such activities or their fam-  
3 ilies for their activities, or for concealing the truth in  
4 respect to them or any of the persons having any con-  
5 nection with them or their activities, and, if so, the  
6 source of the moneys used in such payments, and the  
7 identities and motives of the persons planning such ac-  
8 tivities or employing the participants in them;

9 (6) Whether any persons participating in any of  
10 the activities mentioned in subdivision (1), (2), (3),  
11 (4), or (5) of this section have been induced by brib-  
12 ery, coercion, threats, or any other means whatsoever  
13 to plead guilty to the charges preferred against them in  
14 the District Court of the District of Columbia or to  
15 conceal or fail to reveal any knowledge of any of the  
16 activities mentioned in subdivision (1), (2), (3),  
17 (4), or (5) of this section, and, if so, the identities  
18 of the persons inducing them to do such things, and the  
19 identities of any other persons or any committees or  
20 organizations for whom they acted;

21 (7) Any efforts to disrupt, hinder, impede, or sabo-  
22 tage in any way any campaign, canvass, or activity con-  
23 ducted by or in behalf of any person seeking nomination  
24 or election as the candidate of any political party for the  
25 office of President of the United States in 1972 by in-

1       filtrating any political committee or organization or head-  
2       quarters or offices or home or whereabouts of the person  
3       seeking such nomination or election or of any person  
4       aiding him in so doing, or by bugging or eavesdropping  
5       or wiretapping the conversations, communications,  
6       plans, headquarters, offices, home, or whereabouts of the  
7       person seeking such nomination or election or of any  
8       other person assisting him in so doing, or by exercising  
9       surveillance over the person seeking such nomination or  
10      election or of any person assisting him in so doing, or by  
11      reporting to any other person or to any political com-  
12      mittee or organization any information obtained by such  
13      infiltration, eavesdropping, bugging, wiretapping, or  
14      surveillance;

15           (8) Whether any person, acting individually or in  
16      combination with others, or political committee or orga-  
17      nization induced any of the activities mentioned in sub-  
18      division (7) of this section or paid any of the partici-  
19      pants in any such activities for their services, and, if so,  
20      the identities of such persons, or committee, or organiza-  
21      tion, and the source of the funds used by them to procure  
22      or finance such activities;

23           (9) Any fabrication, dissemination, or publication  
24      of any false charges or other false information having  
25      the purpose of discrediting any person seeking nomina-

1     tion or election as the candidate of any political party  
2     to the office of President of the United States in 1972;

3             (10) The planning of any of the activities men-  
4     tioned in subdivision (7), (8), or (9) of this section,  
5     the employing of the participants in such activities,  
6     and the source of any moneys or things of value which  
7     may have been given or promised to the participants in  
8     such activities for their services, and the identities of  
9     any persons or committees or organizations which may  
10    have been involved in any way in the planning, pro-  
11    curing, and financing of such activities.

12            (11) Any transactions or circumstances relating to  
13    the source, the control, the transmission, the transfer,  
14    the deposit, the storage, the concealment, the expendi-  
15    ture, or use in the United States or in any other coun-  
16    try, of any moneys or other things of value collected or  
17    received for actual or pretended use in the presidential  
18    election of 1972 or in any related campaign or canvass  
19    or activities preceding or accompanying such election  
20    by any person, group of persons, committee, or orga-  
21    nization of any kind acting or professing to act in behalf  
22    of any national political party or in support of or in  
23    opposition to any person seeking nomination or election  
24    to the office of President of the United States in 1972;

1           (12) Compliance or noncompliance with any act  
2 of Congress requiring the reporting of the receipt or dis-  
3 bursement or use of any moneys or other things of value  
4 mentioned in subdivision (11) of this section;

5           (13) Whether any of the moneys or things of value  
6 mentioned in subdivision (11) of this section were  
7 placed in any secret fund or place of storage for use in  
8 financing any activity which was sought to be concealed  
9 from the public, and, if so, what disbursement or expend-  
10 iture was made of such secret fund, and the identities  
11 of any person or group of persons or committee or or-  
12 ganization having any control over such secret fund or  
13 the disbursement or expenditure of the same;

14          (14) Whether any books, checks, canceled checks,  
15 communications, correspondence, documents, papers,  
16 physical evidence, records, recordings, tapes, or mate-  
17 rials relating to any of the matters or questions the select  
18 committee is authorized and directed to investigate and  
19 study have been concealed, suppressed, or destroyed by  
20 any persons acting individually or in combination with  
21 others, and, if so, the identities and motives of any such  
22 persons or groups of persons;

23          (15) Any other activities, circumstances, materials,  
24 or transactions having a tendency to prove or disprove  
25 that persons acting either individually or in combination

1 with others, engaged in any illegal, improper, or un-  
2 ethical activities in connection with the presidential  
3 election of 1972 or any campaign, canvass, or activity  
4 related to such election;

5 (16) Whether any of the existing laws of the  
6 United States are inadequate, either in their provisions  
7 or manner of enforcement to safeguard the integrity or  
8 purity of the process by which Presidents are chosen.

9 SEC. 3. (a) To enable the select committee to make  
10 the investigation and study authorized and directed by this  
11 resolution, the Senate hereby empowers the select committee  
12 as an agency of the Senate (1) to employ and fix the com-  
13 pensation of such clerical, investigatory, legal, technical, and  
14 other assistants as it deems necessary or appropriate; (2) to  
15 sit and act at any time or place during sessions, recesses, and  
16 adjournment periods of the Senate; (3) to hold hearings for  
17 taking testimony on oath or to receive documentary or physi-  
18 cal evidence relating to the matters and questions it is author-  
19 ized to investigate or study; (4) to require by subpoena or  
20 otherwise the attendance as witnesses of any persons who  
21 the select committee believes have knowledge or information  
22 concerning any of the matters or questions it is authorized to  
23 investigate and study; (5) to require by subpoena or order  
24 any department, agency, officer, or employee of the execu-  
25 tive branch of the United States Government, or any private

1 person, firm, or corporation, or any officer or former officer  
2 or employee of any political committee or organization to  
3 produce for its consideration or for use as evidence in its  
4 investigation and study any books, checks, canceled checks,  
5 correspondence, communications, document, papers, physical  
6 evidence, records, recordings, tapes, or materials relating to  
7 any of the matters or questions it is authorized to investigate  
8 and study which they or any of them may have in their  
9 custody or under their control; (6) to make to the Senate  
10 any recommendations it deems appropriate in respect to the  
11 willful failure or refusal of any person to appear before it in  
12 obedience to a subpoena or order, or in respect to the willful  
13 failure or refusal of any person to answer questions or give  
14 testimony in his character as a witness during his appearance  
15 before it, or in respect to the willful failure or refusal of any  
16 officer or employee of the executive branch of the United  
17 States Government or any person, firm, or corporation, or any  
18 officer or former officer or employee of any political committee  
19 or organization, to produce before the committee any books,  
20 checks, canceled checks, correspondence, communications,  
21 document, financial records, papers, physical evidence, rec-  
22 ords, recordings, tapes, or materials in obedience to any sub-  
23 pena or order; (7) to take depositions and other testimony on  
24 oath anywhere within the United States or in any other  
25 country; (8) to procure the temporary or intermittent serv-



1 ices of individual consultants, or organizations thereof, in the  
2 same manner and under the same conditions as a standing  
3 committee of the Senate may procure such services under  
4 section 202 (i) of the Legislative Reorganization Act of  
5 1946; (9) to use on a reimbursable basis, with the prior  
6 consent of the Government department or agency concerned  
7 and the Committee on Rules and Administration, the serv-  
8 ices of personnel of any such department or agency; (10) to  
9 use on a reimbursable basis or otherwise with the prior con-  
10 sent of the chairman of any other of the Senate committees  
11 or the chairman of any subcommittee of any committee of  
12 the Senate the facilities or services of any members of the  
13 staffs of such other Senate committees or any subcommittees  
14 of such other Senate committees whenever the select com-  
15 mittee or its chairman deems that such action is necessary or  
16 appropriate to enable the select committee to make the in-  
17 vestigation and study authorized and directed by this resolu-  
18 tion; (11) to have access through the agency of any mem-  
19 bers of the select committee ~~or any of its investigatory or~~  
20 ~~legal assistants designated by it or its chairman or the rank-~~  
21 ~~ing minority member, chief majority counsel, minority coun-~~  
22 ~~sel, or any of its investigatory assistants jointly designated by~~  
23 ~~the chairman and the ranking minority member~~ to any data,  
24 evidence, information, report, analysis, or document or papers  
25 relating to any of the matters or questions which it is author-

1 ized and directed to investigate and study in the custody or  
2 under the control of any department, agency, officer, or em-  
3 ployee of the executive branch of the United States Govern-  
4 ment having the power under the laws of the United States  
5 to investigate any alleged criminal activities or to prosecute  
6 persons charged with crimes against the United States which  
7 will aid the select committee to prepare for or conduct the  
8 investigation and study authorized and directed by this reso-  
9 lution; and (12) to expend to the extent it determines nec-  
10 essary or appropriate any moneys made available to it by the  
11 Senate to perform the duties and exercise the powers con-  
12 ferred upon it by this resolution and to make the investigation  
13 and study it is authorized by this resolution to make.

14 (b) Subpenas may be issued by the select committee  
15 acting through the chairman or any other member desig-  
16 nated by him, and may be served by any person designated  
17 by such chairman or other member anywhere within the  
18 borders of the United States. The chairman of the select  
19 committee, or any other member thereof, is hereby author-  
20 ized to administer oaths to any witnesses appearing before  
21 the committee.

22 (c) In preparing for or conducting the investigation and  
23 study authorized and directed by this resolution, the select  
24 committee shall be empowered to exercise the powers con-  
25 ferred upon committees of the Senate by section 6002 of title

1 18 of the United States Code or any other Act of Congress  
2 regulating the granting of immunity to witnesses.

3 SEC. 4. The select committee shall have authority to  
4 recommend the enactment of any new congressional legis-  
5 lation which its investigation considers it is necessary or  
6 desirable to safeguard the electoral process by which the  
7 President of the United States is chosen.

8 SEC. 5. The select committee shall make a final report of  
9 the results of the investigation and study conducted by it  
10 pursuant to this resolution, together with its findings and  
11 its recommendations as to new congressional legislation it  
12 deems necessary or desirable, to the Senate at the earliest  
13 practicable date, but no later than February 28, 1974. The  
14 select committee may also submit to the Senate such interim  
15 reports as it considers appropriate. After submission of its  
16 final report, the select committee shall have three calendar  
17 months to close its affairs, and on the expiration of such  
18 three calendar months shall cease to exist.

19 SEC. 6. The expenses of the select committee through  
20 February 28, 1974, under this resolution shall not exceed  
21 \$500,000, of which amount not to exceed \$25,000 shall be  
22 available for the procurement of the services of individual  
23 consultants or organizations thereof. Such expenses shall be  
24 paid from the contingent fund of the Senate upon vouchers  
25 approved by the chairman of the select committee.

1 *The minority members of the select committee shall have one-*  
2 *third of the professional staff of the select committee (includ-*  
3 *ing a minority counsel) and such part of the clerical staff*  
4 *as may be adequate.*

93d CONGRESS  
1st Session

## S. RES. 60

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# RESOLUTION

To establish a select committee of the Senate to conduct an investigation and study of the extent, if any, to which illegal, improper, or unethical activities were engaged in by any persons, acting individually or in combination with others, in the presidential election of 1972, or any campaign, canvass, or other activity related to it.

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By Mr. ERVIN and Mr. MANSFIELD

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FEBRUARY 5, 1973

Ordered to be placed on the calendar

FEBRUARY 7, 1973

Considered, amended, and agreed to

93<sup>D</sup> CONGRESS  
1<sup>ST</sup> SESSION

# S. RES. 95

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## IN THE SENATE OF THE UNITED STATES

APRIL 6, 1973

Mr. ERVIN submitted the following resolution; which was considered and agreed to

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## RESOLUTION

To amend S. Res. 60, of Ninety-third Congress, first session.

- 1       *Resolved*, That S. Res. 60, Ninety-third Congress, be  
2 amended as follows: in section 3 (a) —
- 3           1. Renumber subsection (12) as subsection (13).  
4           2. Insert the following between the “;” at the end  
5 of subsection (11) and renumbered subsection (13):  
6       “(12) to procure either through assignment by the  
7 Rules Committee or by renting such offices and other  
8 space as may be necessary to enable it and its staff to  
9 make and conduct the investigation and study authorized  
10 and directed by this resolution;”,

V

93D CONGRESS  
1ST SESSION

## S. RES. 95

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### RESOLUTION

To amend S. Res. 60, of Ninety-third Congress,  
first session.

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By Mr. ERVIN

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APRIL 6, 1973  
Considered and agreed to

93<sup>d</sup> CONGRESS  
1<sup>st</sup> SESSION

# S. RES. 132

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## IN THE SENATE OF THE UNITED STATES

JUNE 25, 1973

Mr. ERVIN (for himself and Mr. BAKER) submitted the following resolution;  
which was considered and agreed to

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## RESOLUTION

To increase the sums allotted to the Senate Select Committee on Presidential Campaign Activities for the expenses of conducting the investigation and study authorized and directed by Senate Resolution 60 which was adopted on February 7, 1973.

1       *Resolved,*

2       SECTION 1. That the first sentence of section 6 of Senate  
3       Resolution 60, which was adopted on February 7, 1973, is  
4       hereby changed to read as follows: "The expenses of the  
5       select committee through February 28, 1974, under this res-  
6       olution shall not exceed \$1,000,000, of which amount not  
7       to exceed \$40,000 shall be available for the procurement  
8       of the services of individual consultants or organizations  
9       thereof."

V



93d CONGRESS  
1st Session

## **S. RES. 132**

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### **RESOLUTION**

To increase the sums allotted to the Senate Select Committee on Presidential Campaign Activities for the expenses of conducting the investigation and study authorized and directed by Senate Resolution 60 which was adopted on February 7, 1973.

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By Mr. ERVIN and Mr. BAKER

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JUNE 25, 1973

Considered and agreed to

93D CONGRESS  
1ST SESSION

# S. RES. 181

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## IN THE SENATE OF THE UNITED STATES

OCTOBER 10, 1973

Mr. ERVIN (for himself and Mr. BAKER) submitted the following resolution:  
which was considered and agreed to

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## RESOLUTION

Authorizing the chairman of the Senate Select Committee on Presidential Campaign Activities to testify and produce committee records before the United States District Court for the Southern District of New York pursuant to subpoenas issued in a criminal case pending in such court.

Whereas the Senate finds:

1. That a criminal case entitled United States of America vs. John N. Mitchell, Maurice Stans, and others, which is numbered 73 Cr. 439 (LPG) and which involves a campaign contribution for \$250,000 allegedly made by Robert Vesco, is pending in the United States District Court for the Southern District of New York;

2. That Senator Sam J. Ervin, Jr., (who is hereafter called Senator Ervin), Chairman of the Senate Select Com-

mittee on Presidential Campaign Activities (which is hereafter called the Select Committee), has been served with three subpoenas issued by a deputy clerk of said District Court upon the application of John N. Mitchell and Maurice Stans commanding him to appear before said District Court at Foley Square, room 906, in the city of New York on October 23, 1973, at 10 o'clock a.m. to testify in the aforesaid criminal case and to bring with him various things allegedly in the possession of the Select Committee, which are described in the several subpoenas;

3. That the things mentioned in the first subpoena are described in it as follows: "All records, tape recordings, notes, memoranda of conversations, interviews or testimony in executive session of the Committee conducted by Committee members, counsel, or staff of John W. Dean, III, which relate in whole or in part, directly or indirectly to the following: (a) The \$250,000 contribution from Robert Vesco; (b) That portion of the SEC investigation bearing on the \$250,000 contribution; and (c) Dealings with the SEC, Department of Justice, United States Attorney—Southern District of New York.";

4. That the things mentioned in the second subpoena are described in it as follows: "All records, tape recordings, notes, memoranda of conversations, interviews or testimony in executive session of the Committee conducted by Committee members, counsel, or staff of Hugh Sloan which relate in whole or in part, directly or indirectly to the following: (a) The \$250,000 contribution from Robert Vesco; (b) That portion of the SEC investigation bearing on the \$250,000 contribution; and (c) Dealings with the SEC, Department of Justice, United States Attorney—Southern District of New York.";

5. That the things mentioned in the third subpoena are described in it as follows: "All reports, files, records, notes, memoranda, and other tangible evidence of contributions, donations or gifts in excess of \$1,000 made to all candidates in the 1972 Presidential Campaign of either the Republican or the Democratic Party, including but not limited to primaries, which specify or relate to the following: (a) The names and addresses of the contributors and recipients; (b) The dates of all such contributions; and (c) The manner of payment of such contributions, whether it be by a check, cash, security or some other form of payment.";

6. That Senator Ervin believes it is the duty of all persons to cooperate with the courts in the administration of criminal justice, and for this reason asks the Senate for authority to appear and testify in person on the trial of said criminal case if the defendants, John N. Mitchell and Maurice Stans, so desire, despite the fact that he is not aware of any personal knowledge which would make him a competent witness on the trial;

7. That the Select Committee did not investigate the contribution of \$250,000 allegedly made by Robert Vesco or collect any information relating to it because it understood that the defendants, John N. Mitchell and Maurice Stans, were indicted in the pending criminal case on some charge arising out of such contribution, and because it refrains from investigating matters covered by pending indictments;

8. That for this reason, the Select Committee does not have in its custody, control or possession any of the things described in the first and second subpoenas;

9. That the Select Committee is virtually without any original reports, records, or memoranda of any kind relating to campaign contributions but does have in its possession

enormous quantities of following: (a) Copies made by its investigators from original reports, records, and memoranda relating to campaign contributions now in the possession of others; (b) Notes of interviews of numerous persons conducted by committee investigators; and (c) Notes made by committee investigators for the purpose of refreshing their recollection in respect to what their oral investigations revealed;

10. That since the third subpoena makes no distinction between the originals and copies of reports, records, and memoranda, the Select Committee believes that it may have in its possession copies of reports, records, and memoranda called for by the third subpoena; but the Select Committee is unable to determine without further enlightenment whether any of these copies of reports, records, or memoranda are relevant to any of the issues joined in the aforesaid criminal case;

11. That all members of the Select Committee believe that it is their duty to cooperate with the courts in their administration of criminal justice, and for this reason they are desirous of having the Select Committee and its Chairman make available to the defendants, John N. Mitchell and Maurice Stans, any of the copies of reports, records, and memoranda in the possession of the Select Committee which are relevant to the issues involved in the aforesaid criminal case;

12. That the Senate believes that the most appropriate method by which such relevancy can be ascertained is by consultation between the Select Committee and counsel for the defendants, John N. Mitchell and Maurice Stans, or by preliminary orders entered by the said District Court upon appropriate motions made by the Select Committee;

13. That all of the members of the Select Committee are desirous that the Senate adopt this resolution: Now, therefore, be it

1       *Resolved*, That the Senate hereby authorizes Senator  
2 Ervin to appear and testify in person before the United  
3 States District Court for the Southern District of New  
4 York in the aforesaid criminal case in the event the defend-  
5 ants, John N. Mitchell and Maurice Stans, desire him to  
6 do so.

7       SEC. 2. That the Senate hereby authorizes Senator  
8 Ervin to make return to the first and second subpoenas stat-  
9 ing that the Select Committee does not have in its possession  
10 any of the things described in them.

11       SEC. 3. That the Senate hereby authorizes Senator  
12 Ervin, as Chairman of the Select Committee to produce  
13 before the United States District Court for the Southern  
14 District of New York on the trial of the aforesaid criminal  
15 case the originals or copies of any reports, records, or memo-  
16 randa mentioned in the third subpoena which may be rele-  
17 vant to the issues involved in the aforesaid criminal case;

18       SEC. 4. That the Senate authorizes the Select Commit-  
19 tee to ascertain by consultation with counsel for the defend-  
20 ants, John N. Mitchell and Maurice Stans, or by motions in  
21 the United States District Court for the Southern District

1 of New York the relevancy, if any, to the issues involved in  
2 the aforesaid criminal case of any of the things in the pos-  
3 session of the Select Committee which are described in the  
4 third subpoena.

93d CONGRESS  
1st Session

## **S. RES. 181**

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### **RESOLUTION**

Authorizing the chairman of the Senate Select Committee on Presidential Campaign Activities to testify and produce committee records before the United States District Court for the Southern District of New York pursuant to subpoenas issued in a criminal case pending in such court.

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**By Mr. ERVIN and Mr. BAKER**

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**OCTOBER 10, 1973**

**Considered and agreed to**



93<sup>D</sup> CONGRESS  
1<sup>ST</sup> SESSION

# S. RES. 194

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## IN THE SENATE OF THE UNITED STATES

NOVEMBER 2, 1973

MR. ERVIN (for himself, MR. BAKER, MR. GURNEY, MR. INOUE, MR. MONTOYA, MR. TALMADGE, and MR. WEICKER) submitted the following resolution; which was ordered to be placed on the calendar

NOVEMBER 7, 1973

Considered and agreed to

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## RESOLUTION

Relating to S. Res. 60.

1      *Resolved, That—*

2      SECTION 1. By S. Res. 60, Ninety-third Congress, first  
3 session (1973), section 3 (a) (5), the Select Committee on  
4 Presidential Campaign Activities was and is empowered to  
5 issue subpoenas for documents, tapes, and other material to  
6 any officer of the executive branch of the United States Gov-  
7 ernment. In view of the fact that the President of the United  
8 States is, as recognized by S. Res. 60, an officer of the  
9 United States, and was a candidate for the office of President  
10 in 1972 and is therefore a person whose activities the select  
11 committee is authorized by S. Res. 60 to investigate, it is

1 the sense of the Senate that the select committee's issuance  
2 on July 23, 1973, of two subpoenas duces tecum to the Pres-  
3 ident for the production of tapes and other materials was  
4 and is fully authorized by S. Res. 60. Moreover, the Senate  
5 hereby approves and ratifies the committee's issuance of  
6 these subpoenas.

7       SEC. 2. On August 9, 1973, the select committee and its  
8 members instituted suit against the President of the United  
9 States in the United States District Court for the District of  
10 Columbia to achieve compliance with the two subpoenas ref-  
11 erenced in section 1 above, and since that time, in both the  
12 district court and the United States Court of Appeals for the  
13 District of Columbia Circuit, have actively pursued this litigation.  
14 It is the sense of the Senate that the initiation and pur-  
15 suit of this litigation by the select committee and its members  
16 was and is fully authorized by applicable custom and law,  
17 including the provisions of S. Res. 262, Seventieth Congress,  
18 first session (1928). In view of the entirely discretionary  
19 provisions of section 3 (a) (6) of S. Res. 60, it is further  
20 the sense of the Senate that the initiation of this lawsuit did  
21 not require the prior approval of the Senate. Moreover, the  
22 Senate hereby approves and ratifies the actions of the select  
23 committee in instituting and pursuing the aforesaid litigation.

24       SEC. 3. The select committee and its members, by issuing  
25 subpoenas to the President and instituting and pursuing litigation

1 tion to achieve compliance with those subpoenas, were and  
2 are acting to determine the extent of possible illegal, im-  
3 proper, or unethical conduct in connection with the Pres-  
4idential campaign and election of 1972 by officers or  
5 employees of the executive branch of the United States Gov-  
6 ernment or other persons. It is the sense of the Senate that,  
7 in so doing, the select committee and its members were and  
8 are engaged in the furtherance of valid legislative purposes,  
9 to wit, a determination of the need for and scope of corrective  
10 legislation to safeguard the processes by which the President  
11 of the United States is elected and, in that connection, the  
12 informing of the public of the extent of illegal, improper, or  
13 unethical activities that occurred in connection with the  
14 Presidential campaign and election of 1972 and the involve-  
15 ment of officers or employees of the executive branch or  
16 others therein. It is further the sense of the Senate that the  
17 materials sought by the committee's subpoenas are of vital  
18 importance in determining the extent of such involvement  
19 and in determining the need for and scope of corrective  
20 legislation.

93D CONGRESS  
1ST SESSION

## S. RES. 194

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### RESOLUTION

Relating to S. Res. 60.

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By Mr. ERVIN, Mr. BAKER, Mr. GURNEY, Mr.  
INOUE, Mr. MONTOYA, Mr. TALMADGE, and  
Mr. WEICKER

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NOVEMBER 2, 1973

Ordered to be placed on the calendar

NOVEMBER 7, 1973

Considered and agreed to

93<sup>d</sup> CONGRESS  
1<sup>ST</sup> SESSION

# S. RES. 209

## IN THE SENATE OF THE UNITED STATES

DECEMBER 1, 1973

Mr. ERVIN (for himself and Mr. BAKER) submitted the following resolution;  
which was ordered to be placed on the calendar

DECEMBER 4, 1973

Considered and agreed to

## RESOLUTION

To increase the sums allotted to the Senate Select Committee on Presidential Campaign Activities for the expenses of conducting the investigation and study authorized and directed by S. Res. 60 which was adopted on February 7, 1973.

- 1       *Resolved*, That the first sentence of section 6 of S. Res.
- 2   60, which was adopted on February 7, 1973, is hereby
- 3   changed to read as follows: "The expenses of the select
- 4   committee through February 28, 1974, under this resolu-
- 5   tion shall not exceed \$1,500,000, of which amount not to
- 6   exceed \$50,000 shall be available for the procurement of the
- 7   services of individual consultants or organizations thereof."

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93<sup>d</sup> CONGRESS  
1<sup>ST</sup> SESSION

## S. RES. 209

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### RESOLUTION

To increase the sums allotted to the Senate Select Committee on Presidential Campaign Activities for the expenses of conducting the investigation and study authorized and directed by S. Res. 60 which was adopted on February 7, 1973.

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By Mr. ERVIN and Mr. BAKER

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DECEMBER 1, 1973

Ordered to be placed on the calendar

DECEMBER 4, 1973

Considered and agreed to

93<sup>d</sup> CONGRESS  
2<sup>d</sup> SESSION

# S. RES. 286

[Report No. 93-716]

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## IN THE SENATE OF THE UNITED STATES

FEBRUARY 19, 1974

Mr. ERVIN (for himself and Mr. BAKER) submitted the following resolution;  
which was referred to the Committee on Rules and Administration

FEBRUARY 28, 1974

Reported by Mr. CANNON, without amendment

MARCH 1, 1974

Considered and agreed to

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## RESOLUTION

To increase the sums allotted to the Senate Select Committee on  
Presidential Campaign Activities.

- 1       *Resolved*, That the first sentence of section 6 of S. Res.  
2   60, which was adopted on February 7, 1973, is hereby  
3   changed to read as follows: "The expenses of the select  
4   committee through May 28, 1974, under this resolution  
5   shall not exceed \$1,800,000, of which amount not to  
6   exceed \$70,000 shall be available for the procurement of the  
7   services of individual consultants or organizations thereof."

93d CONGRESS  
2d Session

## S. RES. 286

[Report No. 93-716]

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### RESOLUTION

To increase the sums allotted to the Senate Select Committee on Presidential Campaign Activities.

---

By Mr. ERVIN and Mr. BAKER

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FEBRUARY 19, 1974

Referred to the Committee on Rules and Administration

FEBRUARY 28, 1974

Reported without amendment

MARCH 1, 1974

Considered and agreed to



93D CONGRESS  
2D SESSION

# S. RES. 287

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## IN THE SENATE OF THE UNITED STATES

FEBRUARY 19, 1974

Mr. ERVIN (for himself and Mr. BAKER) submitted the following resolution;  
which was considered and agreed to

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## RESOLUTION

To extend until May 28, 1974, the time of the Senate Select Committee on Presidential Campaign Activities, which was created by S. Res. 60, for making its final report and recommendations to the Senate.

- 1       *Resolved*, That the first sentence of section 5 of S. Res.
- 2   60 be amended to read as follows: "The select committee
- 3   shall make a final report of the results of the investigation
- 4   and study conducted by it pursuant to this resolution, to-
- 5   gether with its findings and recommendations as to new
- 6   congressional legislation it deems necessary or desirable, to
- 7   the Senate at the earliest practicable date, but no later than
- 8   May 28, 1974."

93<sup>d</sup> CONGRESS  
2<sup>d</sup> SESSION

## S. RES. 287

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### RESOLUTION

To extend until May 28, 1974, the time of the Senate Select Committee on Presidential Campaign Activities, which was created by S. Res. 60, for making its final report and recommendations to the Senate.

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By Mr. ERVIN and Mr. BAKER

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FEBRUARY 19, 1974

Considered and agreed to

93d CONGRESS  
2d SESSION

# S. RES. 288

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## IN THE SENATE OF THE UNITED STATES

FEBRUARY 21 (legislative day, FEBRUARY 19), 1974

Mr. ERVIN submitted the following resolution; which was considered and agreed to; preamble agreed to

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## RESOLUTION

To authorize the dissemination of certain information to the Internal Revenue Service by the Senate Select Committee on Presidential Campaign Activities; and the inspection by the Select Committee on Presidential Campaign Activities of certain income tax returns, applications for tax exemption, and related documents held by the Internal Revenue Service.

Whereas the Internal Revenue Service, in furtherance of certain on-going investigations, has requested information from the Senate Select Committee on Presidential Campaign Activities; and

Whereas, it has come to the attention of the Senate Select Committee on Presidential Campaign Activities that the Internal Revenue Service has, in the course of the aforementioned on-going investigations discovered information

which relates directly to the Senate investigation being conducted by the Senate Select Committee on Presidential Campaign Activities pursuant to Senate Resolution 60 (93d Congress, 1st session). Now, therefore, be it

1       *Resolved*, That the Senate authorizes the Select Com-  
2       mittee on Presidential Campaign Activities to make avail-  
3       able to the Internal Revenue Service such information re-  
4       quested by that agency; and be it further

5       *Resolved*, That in accordance with the provisions of  
6       sections 6103 (d) and 6104 (a) (2) of the Internal Rev-  
7       enue Code of 1954, the Senate authorizes the Select Com-  
8       mittee on Presidential Campaign Activities to investigate,  
9       receive and inspect any data, documents or other informa-  
10      tion held by the Internal Revenue Service which relates  
11      directly to that investigation presently being conducted by  
12      the Internal Revenue Service and by the Senate Select Com-  
13      mittee on Presidential Campaign Activities as authorized  
14      by Senate Resolution 60 (93d Congress, 1st session).

93D CONGRESS  
2D SESSION

## S. RES. 288

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### RESOLUTION

To authorize the dissemination of certain information to the Internal Revenue Service by the Senate Select Committee on Presidential Campaign Activities; and the inspection by the Select Committee on Presidential Campaign Activities of certain income tax returns, applications for tax exemption, and related documents held by the Internal Revenue Service.

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By Mr. ERVIN

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FEBRUARY 21 (legislative day, FEBRUARY 19), 1974

Considered and agreed to; preamble agreed to

93<sup>d</sup> CONGRESS  
2<sup>d</sup> SESSION

# S. CON. RES. 86

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IN THE SENATE OF THE UNITED STATES

MAY 15, 1974

Mr. ERVIN submitted the following concurrent resolution; which was referred to the Committee on Rules and Administration

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## CONCURRENT RESOLUTION

Authorizing the printing of additional copies of the hearings and final report of the Senate Select Committee on Presidential Campaign Activities.

1       *Resolved by the Senate (the House of Representatives*  
2       *concurring)*, That the authorization (pursuant to S. Con.  
3       Res. 29, Ninety-third Congress, agreed to June 28, 1973)  
4       for the Senate Select Committee on Presidential Cam-  
5       paign Activities to have printed for its use five thousand  
6       additional copies of its hearings on illegal, improper, or un-  
7       ethical activities during the Presidential election of 1972 be  
8       extended through the duration of its existence as a select  
9       committee.

10       SEC. 2. There shall be printed for the use of the Senate  
11       Select Committee on Presidential Campaign Activities six  
12       thousand additional copies of its final report to the Senate.

93d CONGRESS  
2d SESSION

## S. CON. RES. 86

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### CONCURRENT RESOLUTION

Authorizing the printing of additional copies of  
the hearings and final report of the Senate  
Select Committee on Presidential Campaign  
Activities.

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By Mr. ERVIN

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MAY 15, 1974

Referred to the Committee on Rules and Administration

93<sup>d</sup> CONGRESS  
2<sup>d</sup> SESSION

# S. RES. 327

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IN THE SENATE OF THE UNITED STATES

MAY 20, 1974

Mr. ERVIN (for himself and Mr. BAKER) submitted the following resolution;  
which was ordered to be placed on the calendar

MAY 21, 1974

Considered and agreed to

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## RESOLUTION

To extend the time of the Senate Select Committee on Presidential Campaign Activities for making its final report to the Senate, and for prosecuting its judicial action against the President for certain taped recordings.

- 1       *Resolved*, That section 5 of S. Res. 60, which was
- 2 adopted February 7, 1973, is hereby amended to read as
- 3 follows: "The select committee shall make a final report of
- 4 the results of the investigation and study conducted by it
- 5 pursuant to this resolution, together with its findings and such
- 6 legislative proposals as it deems necessary or desirable, to
- 7 the Senate at the earliest practicable date, but no later than
- 8 June 30, 1974. The select committee may also submit to
- 9 the Senate such interim reports as it considers appropriate.



1 After submission of its final report, the select committee  
2 shall have three calendar months to close its affairs, and on  
3 the expiration of such three calendar months shall cease to  
4 exist: *Provided, however,* That in case the judicial action  
5 brought by the select committee against the President to ob-  
6 tain specified taped recordings of conversations in which the  
7 President and his former aide, John W. Dean, participated is  
8 not finally adjudicated before the expiration of such three  
9 calendar months, the select committee shall continue in exist-  
10 ence thereafter until thirty days subsequent to the occurrence  
11 of one of these alternative events, namely, the judicial action  
12 is finally adjudicated adversely to the select committee, or the  
13 specified taped recordings are actually received by the select  
14 committee pursuant to the final adjudication of such judicial  
15 action or otherwise. In case the last event occurs, the select  
16 committee is empowered to report to the Senate an adden-  
17 dum to its final report setting forth findings and legislative  
18 recommendations based on what the taped recordings  
19 disclose.”.

93<sup>d</sup> CONGRESS  
2<sup>d</sup> SESSION

## S. RES. 327

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### RESOLUTION

To extend the time of the Senate Select Committee on Presidential Campaign Activities for making its final report to the Senate, and for prosecuting its judicial action against the President for certain taped recordings.

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By Mr. ERVIN and Mr. BAKER

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MAY 20, 1974

Ordered to be placed on the calendar

MAY 21, 1974

Considered and agreed to

# **RULES OF PROCEDURE FOR THE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES**

1. Preliminary investigations may be initiated by the committee staff with the approval of the Chairman or at his direction.

2. Committee hearings or meetings shall be conducted by the Chairman or member designated by the Chairman.

3. The Chairman shall give each member written notice of the subject of and scope of any hearings 24 hours prior to the time such hearing is to begin within the District of Columbia; otherwise 48 hours prior thereto. No hearings shall then be held if any member objects unless upon the subsequent approval of the majority of the committee.

4. The Chairman shall have authority to call meetings of the committee which authority he may delegate to any other member. Members shall have at least 24 hours notice of any meeting of the committee within the District of Columbia; otherwise 48 hours prior thereto.

Should a majority of the members request the Chairman in writing to call a meeting of the committee and should the Chairman fail to call such meeting within 10 days thereafter, such majority may call a meeting by filing a written notice with the Clerk who shall promptly notify each member of the committee in writing. If the Chairman is not present at any such meeting, and has not designated another member to conduct the meeting, the ranking majority member present shall preside.

5. A quorum for the transaction of committee business shall consist of a majority of the committee members. Unless otherwise specified in these rules, decisions of the committee shall be by a majority of votes cast. For the purpose of hearing witnesses, taking testimony, and receiving evidence, a quorum will consist of one Senator.

6. No person shall be allowed to be present during a hearing or meeting held in executive session except members and employees of the committee, the witness and his counsel, stenographers, or interpreters of the committee. Other persons whose presence is requested or consented to by the majority of the members of the committee present may be

admitted to such sessions.

7. It shall be the duty of the Clerk and staff director to keep or cause to be kept a record of all committee proceedings, including the record of votes on any matter on which a record vote is taken and of all quorum calls together with all motions, points of order, parliamentary inquiries, rulings of the chair and appeals therefrom. The record shall show those members present at each meeting. Such record shall be available to any member of the committee upon request.

8. A vote by any member of the committee with respect to any measure or matter being considered by the committee may be cast by proxy providing the proxy authorization is in writing to the Chairman, designating the person who is to execute the proxy authorization, and is limited to a specific measure or matter and any amendments pertaining thereto. Proxies shall not be considered for the establishment of a quorum.

9. Subpenas for attendance of witnesses and the production of memoranda, documents, and records may be issued by the Chairman or any other member designated by him, and may be served by any person designated by such Chairman or member. Authorization for the issuance of a subpoena shall be

given by the Chairman or Vice Chairman of the committee, or both, or by the majority of the members of the committee present at a meeting, if either the Chairman or Vice Chairman or both requests that the authorization for the issuance of any particular subpoena or subpoenas be decided by the committee.

10. Each subpoena shall be accompanied by a copy of the Senate resolution authorizing the investigation with respect to which the witness is summoned to testify or to produce papers.

11. Witnesses shall be subpoenaed at a reasonably sufficient time in advance of any hearing in order to give the witness an opportunity to prepare for the hearing, employ counsel should he so desire, and/or produce documents, books, records, memoranda, and papers called for by a subpoena *duces tecum*. The committee shall determine, in each particular instance, what period of time constitutes reasonable notice; however in no case shall it be less than 24 hours.

12. Except when publication is authorized by the Chairman, no member of the committee or staff shall make public the name of any witness subpoenaed before the committee or release any information to the public relating to a witness under subpoena or the issuance of

a subpoena prior to the time and date set for his appearance.

13. All witnesses appearing before the committee, pursuant to subpoena, shall be furnished a printed copy of the rules of procedure of the committee.

14. All witnesses at public or executive investigative hearings shall give all testimony under oath or affirmation which shall be administered by the Chairman or a member of the committee.

15. The time and order of interrogation of witnesses appearing before the committee shall be controlled by the Chairman. Interrogation of witnesses at committee hearings shall be conducted by committee members and authorized committee staff personnel only.

16. Any objection raised by a witness or his counsel to procedures or to the admissibility of testimony and evidence shall be ruled upon by the Chairman or presiding member and such rulings shall be the rulings of the committee, unless a disagreement thereon is expressed by a majority of the committee present. In the case of a tie, the rule of the Chair will prevail.

17. Any witness desiring to make a prepared or written statement for the records of the proceedings shall file a copy of such state-

ment with the counsel of the committee 24 hours in advance of the hearings at which the statement is to be presented, unless the Chairman waives the requirement. All such statements or portions thereof so received which are relevant and germane to the subject of investigation may, at the conclusion of the testimony of the witness and with the approval of a majority of the committee members be inserted in the official transcript of the proceedings.

18. A witness may make a statement, which shall be brief and relevant to the subject matter of his examination, at the beginning and conclusion of his testimony. Each such statement shall not exceed three minutes unless an extension of time is authorized by the Chairman. However, statements which take the form of personal attacks by the witness upon the motives of the committee, the personal character of any members of the Congress or of the committee staff, and intemperate statements, are not deemed to be relevant or germane, shall not be made, and may be stricken from the record of the proceedings.

19. All witnesses at public or executive hearings shall have the right to be accompanied by counsel. Any witness who desires

counsel but who is unable to secure counsel may inform the committee at least 24 hours in advance of his appearance of his inability to retain counsel and the committee will endeavor to secure voluntary counsel for the witness. However, failure to secure counsel will not excuse the witness from appearing.

20. Counsel retained by any witness and accompanying such witness shall be permitted to be present during the testimony of such witness at any public or executive hearing. The sole and exclusive prerogative of the counsel shall be to advise such witness while he is testifying of his legal rights and constitutional rights. Provided, however, that any Government officer or employee being interrogated by the staff or testifying before the committee and electing to have his personal counsel present shall not be permitted to select such counsel from the employees or officers of any Government agency.

21. A witness shall not be excused from testifying in the event his counsel is not present or is ejected for contumacy or disorderly conduct; nor shall counsel for the witness coach the witness, answer for the witness, or put words in the witness' mouth. The failure of any witness to secure counsel shall not excuse such witness from attendance in re-

sponse to subpoena.

22. At the conclusion of the interrogation of his client, counsel shall be permitted to make such reasonable and pertinent requests upon the committee, including the testimony of other witnesses or presentation of other evidence, as he shall deem necessary to protect his client's rights. These requests shall be ruled upon by the committee members present.

23. Counsel for witnesses shall conduct himself in a professional, ethical, and proper manner. His failure to do so shall, upon a finding to that effect by a majority of the committee members present, subject such counsel to disciplinary action which may include warning, censure, removal of counsel from the hearing room, or a recommendation of contempt proceedings.

24. There shall be no direct or cross-examination by counsel appearing for a witness. However, the counsel may submit in writing any questions he wishes propounded to his client or to any other witness. With the consent of the majority of the members present, such question or questions shall be put to the witness by the Chairman, by another member or by counsel of the committee either in the original form or in modified language. The

decision of the committee as to the admissibility of questions submitted by counsel for a witness, as well as their form, shall be final.

25. Any person who is the subject of an investigation in public hearings may submit to the Chairman questions in writing for the cross-examination of the witnesses. Their formulation and admissibility shall be decided by the committee in accordance with rule 25.

26. Any person whose name is mentioned or who is specifically identified, and who believes that testimony or other evidence presented at a public hearing, or comment made by the committee member or counsel, tends to defame him or otherwise adversely affect his reputation, may (a) request to appear personally before the committee to testify on his own behalf, or, in the alternative; (b) file a sworn statement of facts relevant to the testimony, or other evidence or comment complained of. Such request and such statement shall be submitted to the committee for its consideration and action.

27. No testimony taken or material presented in an executive session, or any summary or excerpt thereof shall be made available to other than the committee members and committee staff and no such material or

testimony shall be made public or presented at a public hearing, either in whole or in part, unless authorized by a majority of the committee members or as otherwise provided for in these rules.

28. No evidence or testimony, or any summary or excerpt thereof given in executive session which the committee determines may tend to defame, degrade, or incriminate any person shall be released, or presented at a public hearing unless such person shall have been afforded the opportunity to testify or file a statement in rebuttal, and any pertinent evidence or testimony given by such person, or on his behalf, is made a part of the transcript, summary, or excerpt prior to the public release of such portion of the testimony.

29. A complete and accurate stenographic record shall be made of all testimony at all public and executive committee hearings.

30. A witness shall, upon request, be given a reasonable opportunity before any transcript is made public to inspect in the office of the committee the transcript of his testimony to determine whether it was correctly transcribed and may be accompanied by his counsel during such inspection. If the witness so desires, the committee will furnish him a copy of his testimony, at no expense to the witness.

31. Any corrections in the transcription of the testimony of the witness which the witness desires to make shall be submitted in writing to the committee within 5 days of the taking of his testimony. However, changes shall only be made for the purpose of making minor grammatical corrections and editing, and not for the purpose of changing the substance of the testimony. Any questions arising with respect to such editing shall be decided by the Chairman.

32. A copy of the testimony given in public session or that part of the testimony given by the witness in executive session and subsequently quoted or made part of the record in a public session shall be made available to any witness at his expense, if he so requests. Any witness shall be given a reasonable opportunity to inspect any such public testimony in the committee office.

33. Whenever the Chairman so permits, any committee hearing that is open to the public may be covered, in whole or in part, by television broadcast, radio broadcast, and still photography, or by any other media coverage, provided that such coverage is orderly and unobtrusive.

34. The coverage of any hearing of the committee by television, radio, or still

photography shall be under the direct supervision of the Chairman, who may for good cause terminate such media coverage in whole or in part, or take such other action as the circumstances may warrant.

35. A witness may request, on grounds of distraction, harassment, or physical discomfort, that during his testimony, television, motion picture, and other cameras and lights shall not be directed at him, such requests to be ruled on by the committee members present at the hearing.

36. No recommendation that a witness be cited for contempt of Congress shall be forwarded to the Senate unless and until the committee has, upon notice to all its members, met and considered the alleged contempt and by a majority of the committee voted that such recommendation be made.

37. All staff members shall be confirmed by a majority of the committee. After confirmation, the Chairman shall certify staff appointments to the financial clerk of the Senate, in writing.

38. The Chairman shall have the authority to utilize the services, information, facilities, and personnel of the departments and establishments of the Government, and to procure the temporary or intermittent services of



experts or consultants or organizations thereof to make studies or assist or advise the committee with respect to any matter under investigation.

39. In preparing for or conducting the investigation and study authorized and directed by the resolution creating this committee the committee is empowered to exercise the powers conferred upon committees of the Senate by sections 6002 and 6005 of title 18 of the United States Code or any other act of Congress regulating the granting of immunity to witnesses.

40. All information developed by or made known to any member of the committee staff shall be deemed to be confidential. No member of the committee staff shall communicate to any person, other than a member of the committee or another member of the committee staff, any substantive information with respect to any substantive matter related to the activities of the committee. All communications with the press and other persons not on the committee or committee staff in respect to confidential substantive matters shall be by members of the committee only. Official releases of information to the press on behalf of the committee shall be made only with the express consent of the Chairman and Vice

#### **Chairman.**

41. These rules may be modified, amended, or repealed by a decision of the committee, provided that a notice in writing of the proposed change has been given to each member at least 48 hours prior to the respective action.

**GUIDELINES  
OF THE  
SELECT COMMITTEE ON  
PRESIDENTIAL CAMPAIGN  
ACTIVITIES**

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STATEMENT OF  
SAM J. ERVIN, Jr., CHAIRMAN  
HOWARD H. BAKER, Jr., VICE CHAIRMAN

On Monday, April 16, 1973, the Select Committee on Presidential Campaign Activities met and unanimously adopted guidelines regarding testimony and appearances of prospective witnesses before the Select Committee. The text follows.

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In investigating the matters mentioned in S. Res. 60, the Senate Select Committee on Presidential Campaign Activities will observe its standing rules, its previously established procedures for staff interviews of prospective witnesses, and these guidelines:

1. The committee will receive oral and documentary evidence relevant to the matters S. Res. 60 authorizes it to investigate and matters bearing on the credibility of the witnesses who testify before it.

2. All witnesses shall testify before the committee on oath or affirmation in hearings which shall be open to the public and the news media. This guideline shall not abridge, however, the power of the committee to take the testimony of a particular witness on oath or affirmation in an executive meeting if the committee would otherwise be unable to ascertain whether the witness knows anything relevant to the matters the committee is authorized to investigate.

3. All still and motion picture photography will be completed before a witness actually testifies, and no such photography shall occur while the witness is testifying. Television coverage of a witness and his testimony shall be permitted, however, under the provisions of the Standing Rules of the Committee.

4. In taking the testimony of a witnesses, the committee will endeavor to do two things: First, to minimize inconvenience to the witness and disruption of his affairs; and, second, to afford the witness a fair opportunity to give his testimony without undue interrup-

tion. To achieve the first of these objectives, the committee will honor the request of the witness to the extent feasible for advance notice of the time and place appointed for taking his testimony, complete the taking of of his testimony with as much dispatch as circumstances permit, and release the witness from further attendance on the committee as soon as circumstances allow, subject, however, to the power of the committee to recall him for further testimony in the event the committee deems such action advisable. To afford the witness a fair opportunity to present his testimony, the committee will permit the witness to make an opening statement not exceeding 20 minutes, which shall not be interrupted by questioning, and a closing statement summarizing his testimony, not exceeding 5 minutes, which will not be interrupted by questioning: Provided, however, questions suggested by the closing statement may be propounded after such statement is made.

5. The committee respects and recognizes the right of a prospective witness who is interviewed by the staff of the committee in advance of a public hearing as well as the right of a witness who appears before the committee to be accompanied by a lawyer of his own

choosing to advise him concerning his constitutional and legal rights as a witness.

6. If the lawyer who accompanies a witness before the committee advises the witness to claim a privilege against giving any testimony sought by the committee, the committee shall have the discretionary power to permit the lawyer to present his views on the matter for the information of the committee, and the committee shall thereupon rule on the validity of the claim or its application to the particular circumstances involved and require the witness to give the testimony sought in the event its ruling on the claim is adverse to the witness. Neither the witness nor any other officer or person shall be permitted to claim a privilege against the witness testifying prior to the appearance of the witness before the committee, and the committee shall not rule in respect to the claim until the question by which the testimony is sought is put to the witness.

7. The committee believes that it may be necessary for it to obtain the testimony of some White House aides if the committee is to be able to ascertain the complete truth in respect to the matters it is authorized to investigate by S. Res. 60. To this end, the committee will invite such White House aides as

it has reason to believe have knowledge or information relevant to the matters it is authorized to investigate to appear before the committee and give testimony on oath or affirmation in open hearings respecting such matters. In this connection, the committee will extend to such aides the considerations set forth in detail in guideline No. 4 and the right to counsel set forth in detail in guidelines Nos. 5 and 6. In addition to these considerations and rights, the committee will permit the White House to have its own counsel present when any White House aide appears before the committee as a witness, and permit such counsel to invoke any claim that a privilege available to the President forbids a White House aide to give the testimony sought by the committee, and the committee shall thereupon rule on validity of such claim or its application to the particular testimony sought in the manner and with the effect set forth in guideline No. 6 in respect to a claim of privilege invoked by a witness or his counsel. The committee will not subpoena a White House aide to appear before it or its staff unless such aide fails to make timely response to an invitation to appear.

8. The committee may require the Sergeant at Arms of the Senate, or any of his assist-

ants or deputies, or any available law enforcement officer to eject from a meeting of the committee any person who willfully disrupts the meeting or willfully impedes the committee in the performance of its functions under S. Res. 60.

9. Whenever the committee takes testimony through the agency of less than the majority of the members of the committee, as authorized by its standing rules, the member or members of the committee taking the testimony shall be vested with the powers set forth in these guidelines and shall be deemed to act as the committee in exercising such powers.

## II. Opinion Letters to the Select Committee



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## United States Senate

SELECT COMMITTEE ON  
 PRESIDENTIAL CAMPAIGN ACTIVITIES  
 (PURSUANT TO S. RES. 65, 92D CONGRESS)

WASHINGTON, D.C. 20510

### MEMORANDUM OF LAW

#### Admissibility of Hearsay Statements of a Co-conspirator

While Congressional hearings are not limited to the receipt of evidence competent at a criminal trial, this memorandum will summarize for the information of the Select Committee the evidentiary rules regarding the admissibility at a trial of out-of-court statements of a co-conspirator.

#### A. The Rule.

The basic rule as to the admissibility of a hearsay statement of a co-conspirator against other co-conspirators is as follows: If there is a conspiracy, the statements of any co-conspirator in the course of and in furtherance of a conspiracy are admissible as substantive evidence against all conspirators. The fact of a conspiracy and its membership must be proved, but it may be proven either by circumstantial or direct evidence,

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and this evidence need not be presented before the co-conspirator's statements are heard. If the hearsay statement is presented before proof of the conspiracy, the statement is admitted conditionally, with the final determination of its admissibility dependent upon the presentations of such proof.

To illustrate: In order to induce X to participate in the venture or to do a particular act (which need not be criminal in itself), A (a participant in a crime) tells X that B and C were active with A in an unlawful conspiracy. The testimony by X as to A's out-of-court statement is admissible in a federal criminal trial, as an exception to the hearsay rule, to prove that B and C as well as A were participants in the conspiracy, so long as independent evidence of the conspiracy and participation by B and C is introduced at any point in the proceeding.



B. The Authorities.

The case law, which clearly establishes the admissibility against other co-conspirators of a co-conspirator's out-of-court statements, has an early beginning in the common law. One of the more important English cases is Regina v. O'Connell, 5 St. Tr. N.S. 1, 710-11 (1843):

When evidence is once given to the jury of a conspiracy, against A, B, and C, whatever is done by A, B, or C in furtherance of the common criminal object, is evidence against A, B and C though no direct proof be given that A, B, or C knew of it or actually participated in it . . . . If the conspiracy be proved to have existed, or rather if evidence is given to the jury of its existence, the acts of one in furtherance of the common design are the acts of all; and whatever one does in furtherance of the common design he does as the agent of the co-conspirators.

The modern federal cases apply the same rule.

One such case is United States v. Pugliese, 153 F. 2d 497 (2d Cir. 1945), in which Pugliese and his wife were charged with illegally possessing distilled spirits without having the required revenue stamps. Policemen approached the Pugliese house, talked to Mrs. Pugliese, searched the house and the adjoining one

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and found the illegal liquor. Mrs. Pugliese and then Mr. Pugliese were arrested and tried together. Mr. Pugliese was convicted<sup>\*</sup> and on appeal argued that it was error for the jury to be allowed to use as substantive evidence "against Pugliese the talk between his wife and the policeman." Judge Learned Hand, writing for the Court, stated that the admissibility of the evidence

depended upon whether what she said was a step in a venture to which both were parties. If it was, it was admissible in any prosecution or in any civil action . . . As we said in *Van Riper v. United States*, 13 F. 2d 961, 967: "When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made a 'partnership in crime'. What one does pursuant to their common purpose, all do, and as declarations may be such acts, they are competent against all." See also *United States v. Goodman*, 2 Cir. 129 F. 2d 1009, 1013. The admissibility of the wife's declarations in the case at bar was for the judge, and the fact that the jury later acquitted her was irrelevant. The issue before him was altogether different from that before them: he had only to decide whether, if the jury chose to believe the witnesses, Pugliese and his wife were engaged in a joint undertaking; they had to decide whether they believed the witnesses beyond a doubt. Nor did it make any difference that, when the judge ruled, the prosecution had not yet proved

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<sup>\*</sup>  
- Mrs. Pugliese was acquitted.

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a common enter-prise; the order in which the evidence goes in is never important. Cohen v. United States, 2 Cir. 157 F. 651, 655; Hoeppe1 v. United States, 66 App. D.C. 71, 85 F. 2d 237, 242; United States v. Manton, 2 Cir., 107 F. 2d 834, 844. (Id. at 500.)

The Pugliese case was approved and relied upon in United States v. Annunziato, 293 F. 2d 273 (2d Cir. 1961), which affirmed the conviction of a union business agent for receiving money from an employer in violation of the Labor Management Relations Act. One important piece of evidence in that case was the testimony of Richard Terker, who had succeeded his deceased father, Harry Terker, as President of the Terry Contracting Company, Inc. Judge Henry J. Friendly described the challenged evidence:

(Richard Terker) was allowed, over objection to testify to a luncheon conversation with his father late in June or early in July, 1957. The father informed the son "that he had received a call from Mr. Annunziato" and "that he had been requested by Mr. Annunziato for some money on the particular project in question, the Bridgeport Harbor Bridge. I asked him what he intended to do, and he had agreed to send some up to Connecticut for him." Cross examination developed the sum of money mentioned was \$250. (Id. at 376)

The Court held that Richard Terker could testify as to what his father had told him about his conversation with Annunziato, since Harry Terker's statement was a declaration of a conspirator in furtherance of the conspiracy and therefore admissible against Annunziato.

Another important case is Allen v. United States, 4F. 2d 688 (7th Cir. 1925) in which seventy five defendants were indicted for violation of the prohibition laws and other offenses. The Court described a situation where "from police to mayor, from baliff to the court, corruption was rampant, vice was protected, bribery was common, and justice was a mockery." Id. at 691. The challenged testimony was of a newspaper reporter who related a conversation he had with an unidentified barmaid at one of the drinking establishments in question. The Court ruled that her being in back of the bar showed her to be a co-conspirator and hence "her admission was receivable as against other conspirators, it being made while the conspiracy was in force, and otherwise pertinent." Id. at 694.

The Allen court explained:

A conspiracy may be established by circumstantial evidence or by deduction from facts. The common design is the essence of the crime, and this may be

made to appear when the parties steadily pursue the same object, whether acting separately or together, by common or different means, but ever leading to the same unlawful result. If the parties acted together to accomplish something unlawful, a conspiracy is shown, even though individual conspirators may have done acts in furtherance of the common unlawful design apart from and unknown to others. All of the conspirators need not be acquainted with each other. They may not have previously associated together. One defendant may know but one other member of the conspiracy. But if, knowing that others have combined to violate the law, a party knowingly cooperates to further the object of the conspiracy, he becomes a party thereto. (Id. at 691)

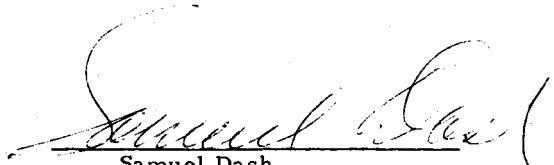
As can be seen from the Allen and Pugliese cases, the amount of independent evidence needed to permit consideration of a co-conspirator's out-of-court statement is well below that needed to secure the conviction. See also United States v. Geaney, 417 F. 2d 1116, 1120 (2d Cir. 1969) ("a fair preponderance of the evidence independent of the hearsay utterances").

Of course, if the conspiracy has ended or the statement is not in furtherance of the conspiracy, for example, a confession by one conspirator after his arrest, the evidence is not admissible against his co-conspirators. In Krulewitch v. United States, 336 U.S. 440, 443-444 (1949), the Supreme Court, by Mr. Justice Black, stated:


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It is firmly established that where made in furtherance of the objectives of a going conspiracy, such statements (of one co-conspirator against another) are admissible as exceptions to the hearsay rule. This prerequisite to admissibility, that hearsay statements by some conspirators to be admissible against another must be made in furtherance of the conspiracy charged, has been scrupulously observed by federal courts.

The leading commentators are fully in accord with this position. See Wigmore, Evidence, Sec. 1079 (Chadbourn rev. 1972); McCormick, Evidence, Sec. 267 (1972 ed). The proposed rules of evidence for Federal courts issued by the Supreme Court on November 20, 1972 makes a statement of a co-conspirator admissible on the ground that co-conspirators are each other's agents. Rule 801(d)(2)(E). Under this approach the statements are not even considered hearsay.

  
\_\_\_\_\_  
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Chief Counsel

May, 1973

  
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## United States Senate

SELECT COMMITTEE ON  
 PRESIDENTIAL CAMPAIGN ACTIVITIES  
 (PURSUANT TO S. RES. 60, 90 CONGRESS)

WASHINGTON, D.C. 20510

### PRELIMINARY MEMORANDUM RE CONTEMPT OF CONGRESS UNDER 2 U.S.C. §192, 194

This memorandum provides a general outline of the acts that constitute contempt of Congress under 2 U.S.C. §192 and the procedures for the prosecution of such acts as set forth in 2 U.S.C. §194. The pertinent statutory provisions are attached to this memorandum. A more comprehensive legal memorandum supporting the basic conclusions herein presented is in preparation. The memorandum in preparation also deals with Congress' non-statutory contempt powers.

An individual who has been validly subpoenaed under Senate Resolution 60, sec. 3(a)(4) or (5) and ordered to appear and testify or produce records is within the jurisdiction of this Committee. After being subpoenaed, the individual may commit contempt by failing to appear or by appearing but refusing to be sworn, to testify or to produce the records requested. United States v. Hintz, 193 F.Supp. 325, 327-28 (N.D. Ill. 1961).

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### A. Failure to Appear

Section 192 provides that every person summoned to testify who "willfully makes default" shall be deemed guilty of a misdemeanor punishable by a fine of not less than \$100 nor more than \$1000 and imprisonment for not less than one month nor more than twelve months. "Default" does not occur until the subpoena return date. United States v. Bryan, 339 U.S. 323, 330 (1950). The "willfully" determination merely requires a showing that the failure to comply was deliberate and not the result of inadvertence or accident. Fields v. United States, 164 F.2d 97, 100 (D.C. Cir. 1947), cert. denied, 332 U.S. 851 (1948). A witness who, without permission, absents himself from the hearing after voluntary appearance or appearance procured by subpoena can also be held in contempt. Townsend v. United States, 95 F.2d 352, 357 (D.C. Cir. 1938), cert. denied, 303 U.S. 664 (1938).

### B. Appearance And Refusal To Be Sworn

The refusal of a witness to be sworn constitutes a refusal to give testimony that warrants prosecution for contempt. Eisler v. United States, 170 F.2d 273, 280-81 (D.C. Cir. 1948), cert. denied, 338 U.S. 883 (1948). A witness who declines to be sworn must first be informed that such conduct is grounds for contempt and ordered to take the oath. If he continues to



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maintain his refusal, a prosecution for contempt may be instigated.

C. Appearance And Refusal To Testify

Section 192 declares that every person "who, having appeared, refuses to answer any question pertinent to the question under inquiry," is in contempt. Thus, a witness under oath must answer all questions relevant to the subject matter of the investigation unless he has a valid Fifth Amendment objection and has not been granted immunity under 18 U.S.C. §6001 et seq. See the accompanying "Preliminary Memorandum Re Procedures For Conferring Immunity And Compelling Testimony And Production Before Senate Select Committee". The witness is entitled to an explanation of the pertinency of a question that must describe the topic under inquiry and the connective reasoning by which the precise question asked relates to it. The explanation must be sufficiently clear to enable the witness to determine for himself whether a proper nexus exists between the request and the subject matter under investigation. Watkins v. United States, 354 U.S. 178, 214-15 (1957).

If, after the explanation is given, the Committee still wishes the witness to answer the question, it must specifically order the witness to respond. Failure to direct the witness to answer may result in a finding

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in a subsequent contempt prosecution that the Committee acquiesced in the witness' objections. Quinn v. United States, 349 U.S. 155, 165-70 (1955). A witness' good faith belief that a question is impertinent or his reliance upon attorney advice that he need not testify is no bar to a conviction for contempt if, in the subsequent prosecution, the refused questions are found proper. Sinclair v. United States, 279 U.S. 263, 299 (1929).

D. Appearance And Refusal To Produce Documents

The willful failure of a witness to supply documents requested by Committee subpoena that are pertinent to the subject matter under investigation is also punishable under 2 U.S.C. §192 (1970), unless a valid Fifth Amendment privilege is asserted. All that is necessary to sustain a finding of willful failure to produce is a showing of intentional and deliberate failure to do so. United States v. Tobir, 195 F.Supp. 588, 614 (D.C.D.C. 1961), reversed on other grounds, 306 F.2d 270 (D.C. Cir. 1962), cert. denied, 371 U.S. 902 (1962).

Each witness has the right, upon request, to an explanation of the pertinency of the records demanded. Such explanation must describe the topic under inquiry and the connective reasoning by which the documents relate to it. The explanation must be adequate to allow the witness to determine whether a sufficient relation exists between the request and the investigation. Watkins v. United States, supra.

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## II. Procedure To Institute Prosecution For Contempt Of Congress

The relevant procedures regarding a contempt prosecution are found in 2 U.S.C. §194. This provision, in essence, provides that when a witness under subpoena refused to comply with the Committee's demands, the factual situation in which that refusal occurred shall be reported in writing to the Senate pursuant to the statutory language, or to the President of the Senate if it is not in session who then must certify the statement of facts to the appropriate United States Attorney who, in turn, is obligated to bring the matter before the grand jury.

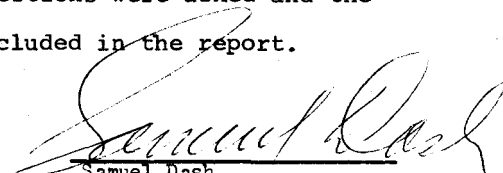
Despite the language of §194 that makes mandatory certification of the statement of facts by the President of the Senate to the United States Attorney, it appears that, before certification, the matters must be put to debate by the Senate and a vote taken, at least if the Senate is in session at the time of the report. If the Senate is not in session, the President of the Senate apparently must make an independent judgment whether certification is warranted. See e.g., Wilson v. United States 369 F.2d 198, 201-03 (D.C. Cir. 1966). However, once the report is certified to the United States Attorney, he has no discretion not to present the case to a grand jury, but must so proceed. The statute does not require that, upon the return of an indictment, a prosecution must be com-

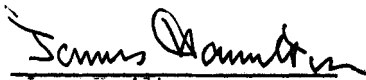
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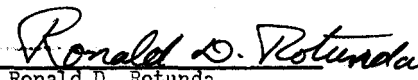
menced, thus apparently leaving the United States Attorney with some discretion whether actually to prosecute.

The statement of facts submitted by the Committee should include, inter alia, a designation of the questions which the witness refused to answer or the records not produced, and a statement that the questions or records were pertinent to the subject under inquiry and that the Committee was thus deprived of information. Excerpts from the transcript of the proceedings before the Committee showing the exact context in which the questions were asked and the refusals made may be included in the report.

April, 1973

  
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(3) For the purposes of this subsection, the members of the Joint Committee on Atomic Energy who are Members of the Senate shall be deemed to be a committee of the Senate. (Pub. L. 91-510, title II, § 252(a), Oct. 26, 1970, 84 Stat. 1173.)

## EFFECTIVE DATE

Section effective immediately prior to noon on Jan. 3, 1971, see section 601(1) of Pub. L. 91-510, set out as a note under section 72a of this title.

§ 190k. Appropriations on annual basis for continuing programs and activities; review by Senate and joint committees; Committee on Appropriations of the Senate, exception.

(a) Each committee of the Senate (except the Committee on Appropriations), and each joint committee of the two Houses of Congress, which is authorized to receive, report, and recommend the enactment of bills and joint resolutions shall, in its consideration of all bills and joint resolutions of a public character within its jurisdiction, endeavor to insure that—

(1) all continuing programs of the Federal Government and of the government of the District of Columbia, within the jurisdiction of such committee or joint committee, are designed; and

(2) all continuing activities of Federal agencies, within the jurisdiction of such committee or joint committee, are carried on;

so that, to the extent consistent with the nature, requirements, and objectives of those programs and activities, appropriations therefor will be made annually.

(b) Each committee of the Senate (except the Committee on Appropriations), and each joint committee of the two Houses of Congress which is authorized to receive, report, and recommend the enactment of, bills and joint resolutions with respect to any continuing program within its jurisdiction for which appropriations are not made annually, shall review such program, from time to time, in order to ascertain whether such program could be modified so that appropriations therefor would be made annually. (Pub. L. 91-510, title II, § 253(a), (b), Oct. 26, 1970, 84 Stat. 1174.)

## EFFECTIVE DATE

Section effective immediately prior to noon on Jan. 3, 1971, see section 601(1) of Pub. L. 91-510, set out as a note under section 72a of this title.

§ 191. Oaths to witnesses.

The President of the Senate, the Speaker of the House of Representatives, or a chairman of any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or of a committee of the whole, or of any committee of either House of Congress, is empowered to administer oaths to witnesses in any case under their examination.

Any member of either House of Congress may administer oaths to witnesses in any matter depending in either House of Congress of which he is a Member, or any committee thereof. (R.S. § 101; June 26, 1884, ch. 123, 23 Stat. 60; June 22, 1938, ch. 594, 52 Stat. 942, 943.)

## DERIVATION

Acts May 3, 1798, ch. 36, § 1, 1 Stat. 554, and Feb. 8, 1817, ch. 10, 3 Stat. 345.

## CODIFICATION

R. S. § 101 constitutes first sentence, and act June 26, 1884, constitutes second sentence.

§ 192. Refusal of witness to testify or produce papers.

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months. (R. S. § 102; June 22, 1938, ch. 594, 52 Stat. 942.)

## DERIVATION

Act Jan. 24, 1857, ch. 19, § 1, 11 Stat. 155.

## SUBPOENA RIGHTS OF HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES

The Chairman of the Committee on Un-American Activities of the House of Representatives is empowered to sign subpoenas issued by the committee to require attendance at any hearing by the provisions of section 121 (q) of the Legislative Reorganization Act of 1946, act Aug. 2, 1946, ch. 753, title I, part 2, § 121 (q), 60 Stat. 828.

## CROSS REFERENCES

Joint Committee on Immigration and Nationality Policy, applicability of section, see section 1106 (g) of Title 8, Aliens and Nationality.

Minor offenses tried by United States magistrates as excluding offenses punishable under this section, see section 3401 of Title 18, Crimes and Criminal Procedure.

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 194 of this title; title 18 section 3401; title 25 section 640; title 42 section 2254; title 43 section 1398.

§ 193. Privilege of witnesses.

No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous. (R. S. § 103; June 22, 1938, ch. 594, 52 Stat. 942.)

## DERIVATION

Act Jan. 24, 1862, ch. 11, 12 Stat. 333.

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 25 section 640; title 42 section 2254; title 43 section 1398.

§ 194. Certification of failure to testify; grand jury action.

Whenever a witness summoned as mentioned in section 192 of this title fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is re-

ported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action. (R. S. § 104; July 13, 1936, ch. 884, 49 Stat. 2041; June 22, 1938, ch. 594, 52 Stat. 942.)

## DERIVATION

Act Jan. 24, 1857, ch. 19, § 3, 11 Stat. 156.

## CROSS REFERENCES

Joint Committee on Immigration and Nationality Policy, applicability of section, see section 1106 (g) of Title 8, Aliens and Nationality.

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 25 section 640; title 42 section 2254; title 43 section 1398.

## § 195. Fees of witnesses in District of Columbia.

Witnesses residing in the District of Columbia and not in the service of the government of said District or of the United States, who shall be summoned to give testimony before any committee of the House of Representatives, shall not be allowed exceeding \$2 for each day's attendance before said committee. (May 1, 1876, ch. 88, 19 Stat. 41.)

## HOUSE RULE ON PAY OF WITNESSES

Rule XXXV, Rules of the House of Representatives, provides that: "The rule for paying witnesses subpoenaed to appear before the House or either of its committees shall be as follows: For each day a witness shall attend, the sum of nine dollars; for each mile he shall travel in coming to or going from the place of examination, the sum of seven cents each way; but nothing shall be paid for traveling when the witness has been summoned at the place of trial."

## § 195a. Restriction on payment of witness fees or travel and subsistence expenses to persons subpoenaed by Congressional committees.

No part of any appropriation disbursed by the Secretary of the Senate shall be available on and after July 12, 1960, for the payment to any person, at the time of the service upon him of a subpoena requiring his attendance at any inquiry or hearing conducted by any committee of the Congress or of the Senate or any subcommittee of any such committee, of any witness fee or any sum of money as an advance payment of any travel or subsistence expense which may be incurred by such person in responding to that subpoena. (Pub. L. 86-628, § 101, July 12, 1960, 74 Stat. 449.)

## § 196. Senate resolutions for investigations; limit of cost.

Senate resolutions providing for inquiries and investigations shall contain a limit of cost of such investigation, which limit shall not be exceeded except by vote of the Senate authorizing additional amounts. (Mar. 3, 1926, ch. 44, § 1, 44 Stat. 162.)

## § 197. Compensation of employees.

The rate of compensation for any position under the appropriations now available for, or hereafter made for, expenses of inquiries and investigations of

the Senate or expenses of special and select committees of the House of Representatives shall not exceed the rates fixed under chapter 51 and subchapter III of chapter 53 of Title 5, for positions with comparable duties; and the salary limitations of \$3,600 attached to appropriations heretofore made for expenses of inquiries and investigations of the Senate or for expenses of special and select committees of the House of Representatives are repealed. (Feb. 9, 1937, ch. 9, title I, § 1, 50 Stat. 9; Oct. 28, 1949, ch. 782, title XI, § 1106(a), 63 Stat. 972.)

## AMENDMENTS

1949—Act Oct. 28, 1949, substituted "Classification Act of 1949" for "Classification Act of 1923", which for purposes of codification has been translated as chapter 51 and subchapter III of chapter 53 of Title 5.

## § 198. Adjournment.

(a) Unless otherwise provided by the Congress, the two Houses shall—

(1) adjourn sine die not later than July 31 of each year; or

(2) in the case of an odd-numbered year, provide, not later than July 31 of such year, by concurrent resolution adopted in each House by roll-call vote, for the adjournment of the two Houses from that Friday in August which occurs at least thirty days before the first Monday in September (Labor Day) of such year to the second day after Labor Day.

(b) This section shall not be applicable in any year if on July 31 of such year a state of war exists pursuant to a declaration of war by the Congress. (Aug. 2, 1946, ch. 753, title I, § 132, 60 Stat. 831; Oct. 26, 1970, Pub. L. 91-510, title IV, § 461(b), 84 Stat. 1193.)

## AMENDMENTS

1970—Pub. L. 91-510, in revising the provisions, incorporated existing subject matter in subsec. (a) (1), substituted therein an adjournment date not later than July 31 of each year for prior provision for a date not later than last day (Sundays excepted) in month of July in each year, added subsec. (a) (2), added subsec. (b), which incorporated former exception to adjournment in time of war, and deleted another exception to adjournment during national emergency proclaimed by the President.

## EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91-510 effective immediately prior to noon on Jan. 3, 1971, see section 601(1) of Pub. L. 91-510, set out as a note under section 72a of this title.

## EFFECTIVE DATE

Section effective Jan. 2, 1947, see section 142 of act Aug. 2, 1946, set out as a note under section 190 of this title.

## Chapter 7.—CONTESTED ELECTIONS

§§ 201 to 226. Repealed. Pub. L. 91-138, § 18, Dec. 5, 1969, 83 Stat. 290.

The subject matter of former sections 201 to 226 of this title is now covered generally by chapter 12 of this title.

Section 201, R.S. § 105, provided that whenever any person intended to contest an election of any member of the House of Representatives he had to give notice in writing to that member within thirty days of the result of such election.

Section 202, R.S. § 106, provided that a member of the House of Representatives whose election was contested serve an answer within thirty days after service of notice upon him.

Section 203, R.S. § 107; Mar. 2, 1875, c. 119, § 2 18 Stat. 338, provided the time and order for taking testimony.

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## United States Senate

SELECT COMMITTEE ON  
 PRESIDENTIAL CAMPAIGN ACTIVITIES  
 (PURSUANT TO S. RES. 69, 93D CONGRESS)  
 WASHINGTON, D.C. 20510

### MEMORANDUM OF LAW

#### THE CONGRESSIONAL CONTEMPT POWER

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## MEMORANDUM OF LAW

THE CONGRESSIONAL CONTEMPT POWER

This memorandum is in addition to the "Preliminary Memorandum re: Contempt of Congress" previously submitted. <sup>\*</sup>/

## I. INTRODUCTION

The investigatory power of Congress, buttressed by the sanction of contempt, is a very broad one. Although nowhere in the Constitution is there expressly granted to either House of Congress a general power to investigate in aid of legislation, the Supreme Court has recognized that such a power is to be implied as an essential concomitant of Congress' legislative authority. Access to outside sources of information is deemed essential to the legislative process, and the Courts have recognized that compulsory procedures are therefore required. See, e.g., McGrain v. Daugherty, 273 U.S. 135, 161, 174-75 (1927), one case which gives explicit judicial recognition of the right of either House of Congress to commit for contempt a witness who ignores its summons or refuses to

<sup>\*</sup>/The use of the court's process to aid in the enforcement of a lawfully issued congressional subpoena as an alternative to the use of contempt is presently the subject of litigation involving the Select Committee and President Nixon. Consequently, it is not the subject of this memorandum.



answer its inquiries.<sup>\*/</sup> The rule in McGrain has much earlier roots as that case recognized. The very first trial by the Congress for contempt (in this case the trial was by the House of Representatives) was in late 1795 and early 1796. One Randall was "convicted" of an attempt to corrupt two members of the House of Representatives. The aid of the Courts was not needed for the House to imprison Randall. He remained as a prisoner of the House until January 13, 1796. One Whitney was discharged on January 5, 1796 because the evidence against him was found to be insufficient. There was no appeal of the

<sup>\*/</sup>In McGrain the high court upheld a Senate investigation as to whether the Department of Justice was performing or neglecting its duties. Such an investigation was one on which legislation could be based and thus the Senate had the power to compel the attendance of witnesses to give information on the subject, although the Resolution did not expressly avow that the investigation was in aid of legislation. 273 U.S. at 177-78. See also Watkins v. United States, 354 U.S. 178, 187 (1957); Woodrow Wilson, Congressional Government (Boston: 1885), at 303-04:

"The informing function of Congress should be preferred even to its legislative function. The argument is not only that discussed and interrogated administration is the only pure and efficient administration, but more than that, that the only really self-governing people is that people which discusses and interrogates its administration..."  
(emphasis added)

Congress also has a right to compulsory process when it exercises its function of judging an election, e.g., Barry v. United States ex rel. Cunningham, 279 U.S. 597 (1929) (investigation of Senatorial election), or determining if a member should be expelled, In re Chapman, 166 U.S. 661 (1897). Similarly if Congress were to exercise its quasijudicial function of impeachment it would have the right to compel the attendance of witnesses.

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imprisonment to the Courts by either Randall or Whitney. Moreland, Congressional Investigations and Private Persons, 40 S. Cal. L. Rev. 189, 190, et seq. (1967).

In the above case, the House used its common law power of contempt; there now exists also a statutory contempt procedure (2 U.S.C. §192). This memorandum will first consider the common law contempt remedy; then it will analyze the statutory procedure, which is in addition to -- and does not preempt -- Congress' common law contempt power.

## II. NONSTATUTORY, COMMON LAW CONTEMPT -- SUBSTANTIVE LAW

The first judicial recognition of a common law power of either House of Congress to punish for contempt is Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821). The Court upheld in broad terms the right of either House to attach and punish a person other than a Member of Congress for contempt of its authority, without using the judicial process. The prisoner, of course, could test the validity of his imprisonment by applying for a Writ of Habeas Corpus or suing the Sergeant at Arms. Thus, in Anderson v. Dunn, supra, 19 U.S. (6 Wheat.) 204 (1821), plaintiff sued the Sergeant at Arms of the House of Representatives for an assault and battery and false imprisonment. See also Marshall v. Gordon, 243 U.S. 521 (1917); Congress has implied power of contempt but may not arrest a person who only published matter slanderous of the House of Representatives and which presented

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no immediate obstruction to legislative processes.<sup>\*/</sup> Appellant in this case applied for habeas corpus after his arrest by the Sergeant at Arms.

Congress has the implied power of contempt because it has:

"the right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is inherent legislative power to compel in order that legislative functions may be performed."  
Marshall v. Gordon, 243 U.S. 521, 542 (1917).

Thus the Senate may hold in contempt a witness who had been commanded to produce papers and who instead destroyed them after service of the subpoena. The punishment for a past contempt is appropriate to vindicate the "established and essential privilege of requiring the production of evidence." Jurney v. MacCracken, 294 U.S. 125, 149-150 (1935).

This inherent common law power of contempt has been reaffirmed in dicta in several more recent cases. See Groppi v. Leslie, 404 U.S. 496 (1972):<sup>\*\*/</sup> "Legislatures are not constituted to conduct full-scale trials or quasi-judicial proceedings and we should not demand that they do so although they

\*/But Congress has the power to order the arrest of a witness to compel his attendance, without first serving a subpoena, if it has reason to believe that the witness will not appear if summoned. Barry v. United States ex. rel. Cunningham, 279 U.S. 597, 616-19 (1929).

<sup>\*\*/</sup>

The Groppi case involved a state legislative body; there is no reason to believe the case would have been decided differently had it involved either House of Congress or a Committee thereof.

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possess inherent power to protect their own processes and existence by way of contempt proceedings." Id. at 500; Russel v. United States, 369 U.S. 749, 756 & n.8 (1962).

Nonstatutory contempt has some advantages over statutory contempt, 2 U.S.C. § 192, discussed infra. Although a United States Attorney has a nondiscretionary duty under the statute to refer a possible Section 192 violation to the Grand Jury, Ex parte Frankfeld, 32 F. Supp. 915 (D.D.C. 1940), see also 2 U.S.C. § 194,<sup>\*</sup> it is unclear what procedures are followed if the United States Attorney fails to perform his duty or engages in a less than energetic prosecution. In addition, while the President has pardoned statutory contempts of Congress -- pursuant to his constitutional right of pardon -- it is unclear as to his power to pardon for nonstatutory contempts of Congress. Professor Corwin, in his The President: Office and Powers (3d rev. ed. 1948), at p. 436 n.134 states that the President may not pardon for nonstatutory contempts of Congress. See also Ex parte Grossman, 267 U.S. 87, 118-20 (1925); Corwin, supra, at 457, n.132.

\*/ However, before the United States Attorney may act on an apparent section 192 violation, there must be a certification to him by either the House involved or the President of the Senate or the Speaker of the House when Congress is not in session. There is no automatic certification to the United States Attorney, for the Committee report of the apparent section 192 violation is then subject to further consideration on the merits. Wilson v. United States, 369 F.2d 198(D.C. Cir.1966) (case construing section 194.)

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It appears that the power of either House to maintain an individual in custody for nonstatutory contempt is limited to the duration of the current session of that House. Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231 (1821). Though the Senate is in theory a continuing body, McGrain v. Daugherty, 273 U.S. 135, 181-182 (1927), it is nonetheless thought that a confinement by the Senate also only exists until the end of its session. Moreland, Congressional Investigations and Private Persons, 40 S. Cal. L. Rev. 189, 199 n.31 (1967). And in any trial before either House due process will require that the contemnor be given notice and an opportunity to be heard prior to conviction and sentencing. Groppi v. Leslie, 404 U.S. 496 (1972).

### III. NONSTATUTORY, COMMON LAW CONTEMPT PROCEDURE

Citations for nonstatutory contempt are normally made as follows. A subpoena is issued by the committee which desires to question a witness; the subpoena is personally served on him. If he fails to appear, or appears and refuses to answer, the committee reports the matter to the full House or Senate which then adopts a resolution that the Speaker of the House or President pro tempore of the Senate command the Sergeant at Arms or his deputy to arrest the offending party and bring him before the bar of the House in question to answer pertinent questions and to be kept in custody to await further order. McGrain v. Daugherty, 273 U.S. 135, 152-54 (1927). The arrest warrant is valid anywhere within the territory of the United States.

Anderson v. Dunn, 19 U.S. (6 Wheat) 204, 234 (1821).

The witness is then brought before the bar of the House or Senate, and again asked the question sought or confronted with the charges against him. He may be given time to prepare a defense or the right to counsel, and allowed to speak in his own behalf. If he refuses to comply with the demand of the House (or Senate) he is cited for contempt by majority vote of the House (or Senate), and remanded to the custody of the Sergeant at Arms to be held in the common jail of the District of Columbia or in the guardroom of the Capitol Police. He will be held until he has purged himself of the contempt, or until released at the end of the session or by vote of the House (or Senate).

The exercise of the inherent contempt power of Congress may be tested by a writ of habeas corpus. Ex parte Nugent, 18 F. Cas. (No. 10375) 471, 481-83, (D.C. Cir. 1848). Cf. Jurney v. MacCracken, 294 U.S. 125 (1935). Congress can exercise its contempt power only within the scope of its constitutional power, and when Congress engages in a "proceeding in a matter beyond their legitimate cognizance ..." the judiciary will intervene. Kilbourn v. Thompson, 103 U.S. 168, 197 (1881). The scope of review is, however, limited, for courts have been reluctant to interfere with the exercise by another branch of government of one of its inherent powers. The court will review only the character of the offense to the extent of determining

that the House has jurisdiction over the prisoner. The issue of guilt of the charge is left to the judgement of Congress.

Jurney v. MacCracken, 294 U.S. 125 (1935) (Brandeis, J.)

"This contention [of MacCracken] goes to the question of guilt, not to that of the jurisdiction of the Senate .... Whether he is guilty, and whether he has so far purged himself of contempt that he does not now deserve punishment, are the questions which the Senate proposes to try. The respondent to the petition did not, by demurring, transfer to the court the decision of those questions. The sole function of the writ of habeas corpus is to have the court decide whether the Senate has jurisdiction to make the determination which it proposes." Id. at 152.

The scope of a federal court's review in a normal habeas proceeding has expanded considerably since Jurney v. MacCracken, supra, but the fact still remains that habeas review is considerably more narrow than the review a court would exercise on direct appeal. See generally, Developments in the Law-Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1113 et seq. (1970). Thus the scope of a court's inquiry over a House of Congress' common law contempt action should be much narrower than the scope of a court's inquiry over a statutory contempt conviction. For example, in a common law contempt action, the nature of the punishment required as remedial action would be within the discretion of the legislature and will not be judged by the courts unless there is "an absolute disregard of discretion and a mere exertion of arbitrary power...", Marshall v. Gordon, 243 U.S. 521, 545 (1917). See also Barry v. United States ex. rel. Cunningham, 279 U.S. 597, 620 (1929).

Since Congress has in recent years relied exclusively on statutory contempt, there are only a few cases in which the courts have ruled on the exercise of the inherent contempt power. In two, Kilbourn v. Thompson, supra, and Marshall v. Gordon, supra, has the Court refused to uphold the Congressional action. It is therefore not entirely clear as to the limits of Congressional power in this area. At the least, all investigations must be made pursuant to a valid legislative purpose, and lacking that purpose, a witness cannot be punished for refusing to cooperate. Kilbourn v. Thompson, 103 U.S. 168, 194-96 (1881). It also appears that no one can be compelled to disclose information on matters which fall outside the authorized scope of inquiry of a committee, for the investigative power is inherent in the House of Congress as a whole, and a committee is restricted to the mission delegated to it by the Congress. Watkins v. United States, 354 U.S. 178, 206 (1957). Thus, a question must meet a pertinency standard <sup>\*/</sup> in order for a contempt for failure to answer the question to pass constitutional muster for "a

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<sup>\*/</sup> The pertinency standard for statutory contempt is discussed in part III of this memorandum, "Statutory Contempt."



witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry." McGrain v. Daugherty, 273 U.S. 135, 176 (1929). Where the witness is called before the entire House and the questions asked again, it may well be that pertinency would be measured by the full scope of the investigatory power of Congress and not that of only the committee before which the testimony originally took place.

Since Congress has the power to judge guilt or innocence of the contempts it charges, a finding of willfulness would be a matter to be determined by the appropriate House of Congress, subject only to the limited review discussed, supra. To what extent the requirements read into statutory contempt proceedings, discussed infra, may be found to actually be a part of due process, it is difficult to determine. To date, due process has been applied to legislative contempt proceedings only to the extent of requiring notice and an opportunity to be heard. Groppi v. Leslie, 404 U.S. 496 (1972). It may well be the case that the due process requirements of Groppi will be extended and not limited to the facts of that case. The Groppi Court, however, did explain that due process does not require a quasi-judicial proceeding by a Legislature in order to have a valid contempt. Id. at 500.

Because of the unclear limitations on nonstatutory contempt and because contempt trials are time consuming, in 1857

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Congress enacted a statute providing for criminal process in the federal courts with prescribed penalties for contempt of Congress. The present day version of that statute is 2 U.S.C. section 192. This statute is merely supplementary of the nonstatutory power of Congress; it does not preempt the field. In re Chapman, 166 U.S. 661, 671-72 (1897). However, since Congress, by the use of that statute, seeks the aid of the federal courts, the courts require that every defendant prosecuted for a statutory violation be accorded all of the guarantees and safeguards which the law gives to every defendant in a federal criminal case -- even though the defendant would not have the right to all of those guarantees had Congress used its own common law power of contempt and not resorted to the courts. E.g., Watkins v. United States, 354 U.S. 178, 206-08 (1957).

It is to section 192 that we now turn.

#### IV. STATUTORY CONTEMPT

2 U.S.C. section 192 (1970)<sup>\*/</sup> provides as follows:

\*/ See also:

"§ 193. Privilege of witnesses

"No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous."

"§ 194. Certification of failure to testify: grand jury action failing to testify or produce records  
"Whenever a witness summoned as mentioned in section 192

footnote continued on following page.

"§ 192. Refusal of witness to testify or produce papers

"Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months."

This section has been used extensively in recent years, especially since World War II, and the provision has been considered at length by the courts. Four major elements of the crime have been identified:

- (1.) The investigation during which the contempt occurred must be in aid of a valid legislative purpose.

footnote continued from preceding page.

fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action."

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(2.) The committee conducting the investigation must be authorized to conduct the particular inquiry in question.

(3.) The question that was refused an answer or the papers the production of which was required must be pertinent to the authorized inquiry.

(4.) The default must be willful.

1. Legislative Purpose. The nature of the investigative power requires that each inquiry be based on a constitutional grant of legislative authority. That power is, however, very broad, Watkins v. United States, 354 U.S. 178 (1957):

"It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste." Id. at 187.

However, there is no power to expose the activities of individuals merely for the sake of exposure<sup>\*/</sup> without justification in terms

<sup>\*/</sup> However, Congress and its Committees do have the power "to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government. That was the only kind of activity described by Woodrow Wilson in Congressional Government when he wrote: 'The informing function of Congress should be preferred even to its legislative function.' Id. at 303. From the earliest times in its history, the Congress has assiduously performed an 'informing function' of this nature. See Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153, 168-94." Watkins v. United States, 354 U.S. 178, 200 n. 33 (1957) (emphasis added).

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of functions of Congress; it is not the function of Congress to conduct legislative trials. Id. at 187, 200. Private affairs may be inquired into, however, and their exposure compelled, in pursuit of an independent legislative purpose. Id. at 200, 206. The existence of a valid legislative purpose is to be judged simply by whether the legislative body has jurisdiction over the subject matter of the investigation. United States v. Rumely, 345 U.S. 41, 44 (1953) (an enabling resolution contains the grant and limitations of the committee's power). The fact that a committee has reported no legislation at all as the result of an extended series of hearings does not negate a conclusion that the committee has a legislative purpose. Townsend v. United States, 95 F.2d 352, 355 (D.C. Cir. 1938).

The Court declared in McGrain v. Daugherty, 273 U.S. 135 (1927), that a legislative purpose was to be presumed when the subject matter of the investigation was within the jurisdiction of Congress, since the only legitimate purpose a house could have in investigating would be to aid it in legislating. Id. at 178. The presumption cannot be rebutted by impugning the motives of individual Congressmen, for motive is irrelevant as long as the assembly's legislative purpose is in fact being served. Watkins v. United States, 354 U.S. 178, 200 (1957). Accord, Barrenblatt v. United States, 360 U.S. 109, 132-133 (1959). See also Eisler v. United States, 170 F.2d 273, 278-79 (D.C. Cir. 1948), cert. dismissed, 338 U.S. 883 (1949). The

court will simply refuse to hear allegations that the ulterior motive of the investigators is not to aid legislation but to harass individuals for their political beliefs. Eisler v. United States, supra. Tenney v. Brandhove, 341 U.S. 367, 377-78 (1951) cf. United States v. O'Brien, 391 U.S. 367, 382-86 (1968).

Once a legislative purpose is established, the permissible scope of the investigation is as far reaching as the potential legislative function to which it is related. Townsend v. United States, 95 F.2d 352, 361 (D.C. Cir. 1938). It can encompass all matters necessary to the fulfillment of the legislative purpose.

2. Authority of the Committee. A witness can be punished for refusal to testify before a Congressional committee only if that committee and in turn its subcommittee were authorized by its parent House or committee to conduct the investigation to which the testimony pertained. This requirement is an element of the requirement that the question be pertinent: it is therefore jurisdictional. United States v. Orman, 207 F.2d 148, 153 (3d Cir. 1953). Such authority can be conferred by statute or by special resolution. It is an element of the offense, and must be pleaded and proved by the government. Cojack v. United States, 384 U.S. 702, 705 (1966). (Contempt citation reversed because no showing that parent committee had delegated to subcommittee before whom the witness had appeared the authority to make the inquiry; the full committee also had not specified the

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area of inquiry). The authorization defines the subject of the inquiry and thus puts some limits on its scope- the due process rights of the accused require that the authority be clear and certain, and conferred in accordance with law. Id. at 708, 714. The requirement of committee authorization is composed of two elements. First, the committee or subcommittee must be empowered to conduct the specific investigation undertaken. Second, it must be shown that the inquiry with respect to which the contempt occurred was within the scope of the delegated authority. United States v. Lamont, 236 F.2d 312, 314 (2d Cir. 1956).

In the case of the House Un-American Activities Committee, the Supreme Court was willing to read the committee's authorizing resolution very broadly. Although the Court had criticized the vagueness of the HUAC resolution and the ambiguity of its operative terms in Watkins v. United States, 354 U.S. 178, 202 et seq. (1957), it read Watkins narrowly and the resolution broadly in Barenblatt v. United States, 360 U.S. 109, 117-18 (1959): "Just as legislation is often given meaning by the gloss of legislative reports, administrative interpretation, and long useage, so the proper meaning of an authorization to a congressional committee is not to be derived alone from its abstract terms unrelated to the definite content furnished them by the course of congressional actions." Id. at 117. The committee's history forced the Court to conclude that its legislative authority to conduct the instant inquiry was "unassailable". Id. at 122.

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In other areas, however, the courts have read authorizing resolutions narrowly, particularly where required to avoid the necessity of facing a constitutional question. The Court of Appeals for the District of Columbia Circuit has refused to find that the Senate Select Committee on Lobbying Activities was authorized to inquire into attempts to influence general public opinion through the publication and distribution of political books and pamphlets. The Court found that the subject was too remote from the authorized investigation to sustain abridgement of the freedoms of speech and of the press which might be involved. Fumely v. United States, 197 F.2d 166, 172-75 (D.C. Cir. 1952). See also United States v. Kamin, 136 F. Supp. 791, 801-04 (D. Mass. 1956). And the District of Columbia Circuit took a similar position with respect to a Congressional investigation of the New York Port Authority. A broad House subpoena duces tecum which called for internal memoranda and intra-authority documents was met with a claim of executive privilege. The court did not decide the claim of privilege, but held that the general authorizing resolution could not be construed to permit an investigation of such scope and depth, especially when, contrary to the situation in Barenblatt, such an investigation had not before been attempted. Tobin v. United States, 306 F.2d 270, 274-75 (D.C. Cir. 1962). Before it would feel it necessary to reach squarely the constitutional question raised by an investigation of the magnitude claimed, the court would



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require the authorization to be spelled out in specific terms.  
Id. at 275.

Authorizations go only to the permissible subject matter of an investigation. They do not import authority over all activities of persons related to the subject matter. The affairs of a witness may be investigated only in so far as they relate to that subject: there is no power to inquire beyond it.  
Sumely v. United States, 197 F.2d 166, 176 (D.C. Cir. 1952).

3. Pertinency. Closely related to the problem of the authority of the committee is the requirement that the questions asked be pertinent to the subject under inquiry. Pertinency is an explicit statutory requirement of 2 U.S.C. section 192, which refers to a refusal to answer "any question pertinent to the question under inquiry...." Because of the pertinency requirement, authorizations must be clear and specific. Pertinency is an element of the offense, and since in a criminal proceeding the presumption of regularity of Congressional activity is outweighed by the presumption of innocence of the accused, it must be pleaded and proved by the government. Sinclair v. United States, 279 U.S. 263, 296-97 (1929). It is the particular subject under inquiry at any given time, and not the full investigative authority of the committee, to which the question must be pertinent; thus the indictment must specify the question under congressional committee inquiry at the time of the defendant's alleged default. Russell v. United States, 369 U.S. 749, 771 (1962).

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Pertinency is a broader concept than that of relevance in the field of evidence, extending in its broadest reach to the entire field of inquiry permitted by the legislative purpose. United States v. Orman, 207 F.2d 148, 153 (3d Cir. 1953).

It is a question of law to be decided by the court rather than by the jury, and good faith mistake as to the law is not a defense for the defendant. Binclair v. United States, 279 U.S. 263, 298-99 (1929); Braden v. United States, 365 U.S. 432, 436 (1961).

It is the question and the possible answer which must be pertinent; the pertinence of the actual answer is immaterial. United States v. Orman, 207 F.2d 148, 154 (3d Cir. 1953). Since pertinency is an element of the offense, lower courts have held that the defense is not waived by a failure to object to a question on pertinency grounds. United States v. Orman, 207 F.2d 148, 154 (3d Cir. 1953); Bowers v. United States, 202 F.2d 447, 452 (D.C. Cir. 1953). The Supreme Court has suggested to the contrary in dictum. Barenblatt v. United States, 360 U.S. 109, 123-24 (1959). See also Deutch v. United States, 367 U.S. 456, 472-73, 475 (1961) (Frankfurter, Clark, Harlan & Whittaker dissenting).

When a question is not clearly pertinent on its face, the government will be allowed to introduce extraneous evidence to establish pertinency. Powers v. United States, 202 F.2d 447, 450, 453 (D.C. Cir. 1953). There are generally five methods by which pertinency can be shown:

- (1) From the definition of the inquiry found in the

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authorizing resolution or statute:

- (2) from the opening remarks of the committee chairman
- (3) from the nature of the proceeding;
- (4) from the question itself; and
- (5) from the response of the committee to a pertinency objection.

Watkins v. United States, 354 U.S. 178, 209-214 (1957).

Since statutory contempt is a criminal offense subject to the same due process safeguards as any other offense, avoidance of the infirmity of vagueness requires that a witness be able to know when he is violating the law. The pertinency of the question must therefore be made clear to the witness before he is compelled to answer, at least so long as he makes an objection based on pertinency. Since the witness acts at his peril if he refuses to answer, he is entitled to know in advance the subject of the inquiry to which the committee deems the question pertinent. Watkins v. United States, 354 U.S. 178 (1957). Watkins explained that a witness is entitled to be informed of the relation of the question to the subject of the investigation with the same precision as the due process clause requires of statutes defining crimes. Id. at 208-09. See also id. at 214-15.

Judge Burger, now Chief Justice, while sitting on the District of Columbia Court of Appeals, interpreted Watkins as creating a reasonable man standard: it requires not that the witness in fact subjectively appreciate the pertinency of the

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question, but only that it be demonstrated with sufficient clarity that a reasonable man would have understood it. Sacher v. United States, 252 F.2d 828, 835 (D.C. Cir.), rev'd on other grounds, 356 U.S. 576 (1958).

4. Willfulness. Willful default is the fourth requirement of the statute, and must be proved beyond a reasonable doubt. Quinn v. United States, 349 U.S. 155, 165 (1955). Willfulness does not, however, require action with an evil motive or purpose; all that is required is an intentional and deliberate act, not the product of inadvertence or accident. Good faith on the part of the witness is not a defense. Sinclair v. United States, 279 U.S. 263, 298-99 (1929). Fields v. United States, 164 F.2d 97, 100 (D.C. Cir. 1947), cert. denied, 332 U.S. 851 (1948); Townsend v. United States, 95 F. 2d 352, 358 (D.C. Cir. 1938). The statute encompasses all forms of intentional failure to testify: failing to appear, refusal to be sworn or to answer questions, and leaving the hearing before being excused. Townsend v. United States, 95 F.2d 352, 356 (D.C. Cir. 1938). The witness is, however, entitled to a clear ruling by the committee on his objections to their demands. United States v. Kamp, 102 F. Supp. 757, 759 (D.D.C. 1952). He must not be made to guess as to his legal position; it must be made clear to him that the committee demands an answer notwithstanding his objection, and at what point the committee considers him to be in default. Quinn v. United States, 349 U.S. 155, 165-66 (1955). See also

Flaxer v. United States, 358 U.S. 147 (1958) (Douglas, J.)

Any withholding of subpoenaed documents is a violation of the statute if it in fact results in obstruction of the inquiry, regardless of the form in which it is manifested, although the default does not mature until the return date of the subpoena. If the witness is in fact unable to comply with the request, the burden is on him to come forward to explain that inability. United States v. Bryan, 339 U.S. 323, 329-33 (1950).

#### V. OTHER RIGHTS OF WITNESSES

##### 1. Rules of Procedure.

Congress has the power to determine how its hearings are to be conducted, generally without review by the courts of its procedures. United States v. Hintz, 193 F. Supp. 325, 331 (N.D. Ill. 1961). For example, there is no right to cross-examine unless allowed by the committee, United States v. Fort, 443 F.2d 670, 679 (D.C. Cir. 1970), cert. denied, 403 U.S. 932 (1971). The witness is compelled to abide by the procedures set out, and may not ordinarily impose conditions on his testimony, either by demanding the right to make a statement or to give his testimony in closed session. Id.; Eisler v. United States, 170 F.2d 273 (D.C. Cir. 1948), cert. dismissed, 338 U.S. 883 (1949). A witness, however, can claim the benefit of the Committee's rules. The failure of the committee to abide by its own rules can be a defense to a refusal to testify at a hearing conducted not in accordance with them. Yellin v. United States,

374 U.S. 109 (1963). An investigation by a subcommittee not authorized in conformity with the rules of the committee is likewise void, and will not sustain a conviction for refusal to testify. Gojack v. United States, 384 U.S. 702, 712 (1966). A committee, in short, should exercise care in following its own rules.

## 2. Fifth Amendment.

The fifth amendment right to refuse to incriminate oneself is available to a witness testifying before a Congressional committee. Quinn v. United States, 349 U.S. 155, 162 (1955). The privilege is a personal one, however, and cannot be claimed on behalf of a corporation or in relation to documents kept in a representative capacity. McPhaul v. United States, 364 U.S. 372, 380 (1960): Hale v. Henkel, 201 U.S. 43 (1906).<sup>\*</sup> No particular form of words is necessary to invoke the fifth amendment privilege; all that is required is that the committee be able to understand the claim; the burden is on it to inquire into objections which are unclear. Quinn v. United States, 349 U.S. 155, 162-64 (1955). The privilege, however, is waived unless it is invoked and the witness cannot select the place to stop in his testimony. Once answers to incriminating questions have been given, the privilege is waived as to other questions on the same subject, which can be refused only if they present a real danger

<sup>\*</sup>/

Thus, it may not be able to be claimed by the Committee to Re-elect the President (C.R.P.), an organization, not an individual.

of further incrimination. Rogers v. United States, 340 U.S. 367, 370-74 (1951). The waiver may occur even though the witness was not aware until it was too late that the right had been waived. Rogers v. United States, *supra*.

The witness is not the sole judge of his claim. Hoffman v. United States, 341 U.S. 479 (1951). The privilege cannot be used by the witness as a subterfuge to avoid answering innocent questions. It can be claimed only when there is a reasonable apprehension on the part of the witness that his answer would furnish evidence or reveal sources of evidence which could lead to his conviction for a criminal offense. He may therefore be asked to explain his claim of such a reasonable apprehension, although he may not be forced actually to disclose the information. United States v. Jaffe, 98 F. Supp. 191, 193-94 (D.D.C. 1951). He need not disclose the incriminating facts in order to sustain his claim: it need only be evident that an answer or explanation of refusal to answer might result in injurious disclosures. Emspak v. United States, 349 U.S. 190, 198-99 (1955).

### 3. Necessity of a Quorum.

The necessity of a quorum as a prerequisite to a valid contempt is unclear. The presence of a quorum was required to sustain a conviction for perjury in Christoffel v. United States, 338 U.S. 84 (1949). But one year later the Supreme Court held that the lack of a quorum did not excuse a witness from honoring

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a valid subpoena issued by an authorized committee. United States v. Byran, 339 U.S. 323, 329-32 (1950). While a quorum is probably not necessary, keeping a quorum at the time a witness commits his contemptable act is certainly the more cautious course.

#### 4. Presence of Communications Media.

A witness does not ordinarily have a right to object to the presence of the communications media at a hearing. United States v. Hintz, 193 F. Supp. 325 (N.D. Ill. 1961). In one case, however, a lower court held that the presence of TV cameras and reporters made it impossible for the witness to testify in a calm, considered and truthful manner, and that that condition justified his refusal to testify. United States v. Kleinman, 107 F. Supp. 407, 408 (D.D.C. 1952). Kleinman has certainly not been extended by other courts. In United States v. Orman, 207 F.2d 148 (3d Cir. 1953), for example, the court held that the question of whether a witness before a congressional committee should have a right to demand that information given by him which cannot aid the committee in its legislative purpose be withheld from the public is for legislative, not for judicial control. 207 F.2d at 159. And in United States v. Hintz, 193 F. Supp. 325 (N.D. Ill. 1961), the court stated:

"This court has no power to impose upon Congress, a coordinate branch of our government, either a proscription against or a prescription for radio, television, movies or photographs. This court is of the opinion that the mere presence of such mechanisms at an investigative hearing does not infect the hearing with impropriety." 193 F. Supp. at 331-32.



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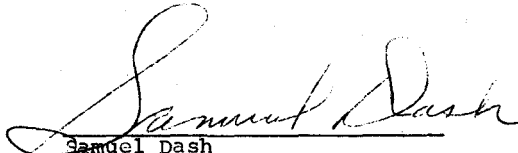
The Hintz court specifically rejected any reading of Kleinman which would per se prevent a conviction of any witness who commits a contempt of Congress "while in the presence of spectators and the sensory apparatus which permits the nation to see and to hear." Id. at 329. However, at a trial the defendant may seek to prove that the conditions of testimony were not reasonably conducive to that clarity and accuracy to which defendant was normally capable. The question is for the factfinder. Id. at 332. See also Rules of Procedure for the Select Committee, Rule 35.


##### 5. Multiple Counts of Contempt.

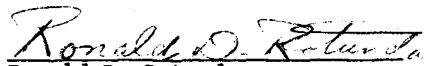
Witnesses are often indicted on multiple counts of contempt, one for each question asked and refused. It has been held, however, that where separate questions relate to a single subject of inquiry or seek to establish a single fact, only one penalty for contempt may be imposed. United States v. Orman, 207 F.2d 148, 160 (3d Cir. 1953). Where there are separate refusals to answer separate questions, it is proper for each refusal to be set out as a separate count. Id. One who has flatly refused to testify further can be prosecuted only for that one refusal; the committee cannot multiply contempts by continuing questioning. United States v. Costello, 198 F.2d 200, 204 (2d Cir.), cert. denied, 344 U.S. 874 (1952). A witness should still be asked several questions so that if a court subsequently finds that some questions were improper, there will be other questions

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upon which a valid conviction may be upheld.

  
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November 16, 1973

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## United States Senate

SELECT COMMITTEE ON  
 PRESIDENTIAL CAMPAIGN ACTIVITIES  
 (PURSUANT TO S. RES. 60, 91st CONGRESS)

WASHINGTON, D.C. 20510

### PRELIMINARY MEMORANDUM RE PROCEDURES FOR CONFERRING IMMUNITY AND COMPELLING TESTIMONY AND PRODUCTION BEFORE SENATE SELECT COMMITTEE

This memorandum outlines the procedures that this Committee must follow to obtain an order from a United States district court that confers immunity on a witness before the Committee and compels him to testify and produce pertinent records. A more detailed memorandum substantiating the conclusions here presented is in preparation.

The relevant statutory provisions, which were part of the Omnibus Crime Control Act of 1970 and are now found at 18 U.S.C. §§6001, 6002, 6005, are attached to this memorandum. At the outset, it should be noted that the immunity conferred upon a witness under §6002 is not total "transactional" immunity. Rather, it is immunity from the "use", for purposes of prosecution, of compelled testimony or records, or any information directly or indirectly derived from such testimony and records, except in a prosecution for perjury, giving false statements, or otherwise failing to comply with the order. The Supreme Court

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in Kastigar v. United States, 406 U.S. 441, 453 (1972), held that a witness, under §6002, could be constitutionally compelled to testify and produce records over his Fifth Amendment objection even though §6002 does not provide complete protection from future prosecution.

#### I. Basic Operation of Statutory Procedure

Unlike previous immunity statutes that automatically conferred immunity upon a witness when he testified, the current provisions require that the witness expressly claim his privilege against self-incrimination, or, where the witness has not yet been called, that there be an indication that he may claim his privilege (see section II, below), before the immunity process can be set in motion. Thus §6002 provides that immunity may be granted "[w]hen a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to . . . either House or Congress, . . . or a committee or a subcommittee of either House." The purpose of the change was to ensure that a witness receives immunity only when he asserts his privilege and to eliminate the previously existing situation where a witness, merely by testifying, would receive an "immunity bath" in regard to all offenses indicated by his testimony.

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Once the claim of privilege has been made or it appears that it may be made, certain specific procedures must be followed before a district court can issue the immunizing order and compel testimony or production. These procedures, which are set forth in §6005, are:

(1) The request for an immunizing order must be approved by an affirmative vote of two-thirds of the members of the full Committee and the application for the order must certify that the application was so approved.

(2) At least ten days prior to the date on which the request for the order is made, the Committee must serve the Attorney General with notice of its intention to submit the request; moreover, certification that the Attorney General has been properly notified must accompany the application.

The purpose of notice to the Attorney General is to allow him to isolate from the immunity grant any incriminating information already in his files, thereby establishing the "independent source" necessary for possible future prosecution. The government has an affirmative burden, in a later criminal prosecution, to demonstrate that evidence used in that prosecution was not derived from immunized testimony or records. See Kastigar v. United States, supra, at 460.

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The Attorney General does not have the power to veto a request for immunity. Moreover, the Court has no discretion to refuse the order provided the procedural prerequisites described above, i.e., an affirmative two-thirds vote of the Committee and notification of the Attorney General, are fulfilled. However, the Attorney General may, under §6005(c), require the District Court to defer the order's issuance for a period not more than twenty days from the date the order is requested. This provision was inserted to allow the Attorney General to obtain additional time, if necessary, to establish an independent basis for future prosecution.

A witness may challenge the application for an immunizing order only on the ground that the prescribed procedural requirements have not been met. No attack on, e.g., the scope of the Committee's jurisdiction or the breadth of the production request, is allowable at this stage.

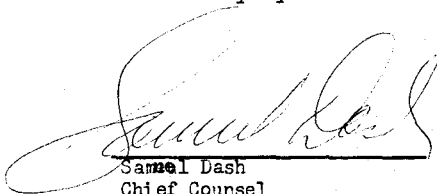
## II. Pre-Hearing Issuance of Direction to Testify

Section 6005 authorizes a grant of immunity and compulsion to testify and produce records regarding a witness who "may be called to testify or provide other information." (emphasis added) It is thus possible for the statutory procedures to be put into

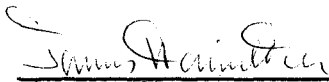
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operation before the witness actually appears and asserts his privilege against self-incrimination. See, e.g., Kastigar v. United States, supra. The purpose behind this provision is obvious. In many cases a Committee will know in advance that a witness will refuse to answer without immunity protection. To require the witness to appear before the Committee and claim his privilege before the immunity procedure is initiated would be a useless ritual.

An advance order is obtained by following the procedures, described above, necessary for the acquisition of a regular immunity order. It appears, however, that, as a technical matter, immunity is not actually conferred until the witness asserts his privilege and is directed to testify by the chairman of the Committee.



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APRIL, 1973



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## TRANSFER OF FUNCTIONS

All functions of all other officers of the Department of Justice and all functions of all agencies and employees of such Department were, with a few exceptions, transferred to the Attorney General, with power vested in him to authorize their performance or the performance of any of his functions by any of such officers, agencies, and employees, by former sections 1 and 2 of 1950 Reorg. Plan No. 2, §§ 1, 2, eff. May 24, 1950, 15 F. R. 3173, 64 Stat. 1261.

## § 5037. Parole.

A juvenile delinquent who has been committed and who, by his conduct, has given sufficient evidence that he has reformed, may be released on parole at any time under such conditions and regulations as the Board of Parole deems proper if it shall appear to the satisfaction of such Board that there is reasonable probability that the juvenile will remain at liberty without violating the law. (June 25, 1948, ch. 645, 62 Stat. 858.)

## LEGISLATIVE HISTORY

*Reviser's Note.*—Based on title 18, U. S. C., 1940 ed., § 927 (June 16, 1938, ch. 486, § 7, 52 Stat. 766).

Reference to section establishing the Board of Parole was omitted as unnecessary.

Minor changes were made in phraseology.

## EXCEPTION FROM TRANSFER OF FUNCTIONS

Functions of the Board of Parole were not included in the transfer of functions of officers, agencies and employees of the Department of Justice to the Attorney General, made by former sections 1 and 2 of 1950 Reorg. Plan No. 2, § 1, eff. May 24, 1950, 15 F. R. 3173, 64 Stat. 1261.

## CROSS REFERENCES

Board of Parole established, see section 4201 of this title.

## Part V.—IMMUNITY OF WITNESSES

## Sec.

- 6001. Definitions.
- 6002. Immunity generally.
- 6003. Court and grand jury proceedings.
- 6004. Certain administrative proceedings.
- 6005. Congressional proceedings.

## AMENDMENTS

1970.—Pub. L. 91-452, title II, § 201(a), Oct. 15, 1970, 84 Stat. 926, added part V and items 6001 to 6005.

## PART REFERRED TO IN OTHER SECTIONS

This part is referred to in title 7 section 2146.

## § 6001. Definitions.

As used in this part—

(1) "agency of the United States" means any executive department as defined in section 101 of title 5, United States Code, a military department as defined in section 102 of title 5, United States Code, the Atomic Energy Commission, the China Trade Act registrar appointed under 53 Stat. 1432 (15 U.S.C. sec. 143), the Civil Aeronautics Board, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Maritime Commission, the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, the National Labor Relations Board, the National Transportation Safety Board, the Railroad Retirement Board, an arbitration board established under 48 Stat. 1193 (45 U.S.C. sec. 157), the Securities and Exchange Commission, the Subversive Activities Control

Board, or a board established under 49 Stat. 31 (15 U.S.C. sec. 715d);

(2) "other information" includes any book, paper, document, record, recording, or other material;

(3) "proceeding before an agency of the United States" means any proceeding before such an agency with respect to which it is authorized to issue subpoenas and to take testimony or receive other information from witnesses under oath; and

(4) "court of the United States" means any of the following courts: the Supreme Court of the United States, a United States court of appeals, a United States district court established under chapter 5, title 28, United States Code, the District of Columbia Court of Appeals, the Superior Court of the District of Columbia, the District Court of Guam, the District Court of the Virgin Islands, the United States Court of Claims, the United States Court of Customs and Patent Appeals, the Tax Court of the United States, the Customs Court, and the Court of Military Appeals.

(Added Pub. L. 91-452, title II, § 201(a), Oct. 15, 1970, 84 Stat. 926.)

## EFFECTIVE DATE; SAVINGS PROVISION

Section 260 of Pub. L. 91-452 provided that: "The provisions of part V of title 18, United States Code, added by title II of this Act [this part], and the amendments and repeals made by title II of this Act [sections 835, 895, 1406, 1954, 2424, 2514 and 3486 of this title, sections 15, 87f, 135c, 499m, and 2115 of Title 7, section 25 of Title 11, section 1820 of Title 12, sections 32, 33, 49, 77v, 78u, 79r, 80a-41, 80b-9, 155, 717m, 1271, and 1714 of Title 15, section 825f of Title 16, section 1333 of Title 19, section 373 of Title 21, sections 4874 and 7493 of Title 26, section 161 of Title 29, section 506 of Title 33, sections 405 and 2201 of Title 42, sections 157 and 362 of Title 45, sections 827 and 1124 of Title 46, section 409 of Title 47, sections 9, 43, 46-48, 916, 1017, and 1484 of Title 49, section 792 of Title 50, and sections 643a, 1152, 2026, and 2155 of Title 50, Appendix], shall take effect on the sixtieth day following the date of the enactment of this Act [Oct. 15, 1970]. No amendment to or repeal of any provision of law under title II of this Act shall affect any immunity to which any individual is entitled under such provision by reason of any testimony or other information given before such day."

## AMENDMENT OR REPEAL OF INCONSISTENT PROVISIONS

Section 259 of Pub. L. 91-452 provided that: "In addition to the provisions of law specifically amended or specifically repealed by this title [see effective date note set out under this section], any other provision of law inconsistent with the provisions of part V of title 18, United States Code (adding by title II of this Act) [this part], is to that extent amended or repealed."

## § 6002. Immunity generally.

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the



order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order. (Added Pub. L. 91-452, title II, § 201(a), Oct. 15, 1970, 84 Stat. 927.)

## EFFECTIVE DATE

Section effective on the sixtieth day following Oct. 15, 1970, see section 260 of Pub. L. 91-452, set out as a note under section 6001 of this title.

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 6003, 6004, 6005 of this title.

## § 6003. Court and grand jury proceedings.

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

(Added Pub. L. 91-452, title II, § 201(a), Oct. 15, 1970, 84 Stat. 927.)

## EFFECTIVE DATE

Section effective on the sixtieth day following Oct. 15, 1970, see section 260 of Pub. L. 91-452, set out as a note under section 6001 of this title.

## § 6004. Certain administrative proceedings.

(a) In the case of any individual who has been or who may be called to testify or provide other information at any proceeding before an agency of the United States, the agency may, with the approval of the Attorney General, issue, in accordance with subsection (b) of this section, an order requiring the individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) An agency of the United States may issue an order under subsection (a) of this section only if in its judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

(Added Pub. L. 91-452, title II, § 201(a), Oct. 15, 1970, 84 Stat. 927.)

## EFFECTIVE DATE

Section effective on the sixtieth day following Oct. 15, 1970, see section 260 of Pub. L. 91-452, set out as a note under section 6001 of this title.

## § 6005. Congressional proceedings.

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before either House of Congress, or any committee, or any subcommittee of either House, or any joint committee of the two Houses, a United States district court shall issue, in accordance with subsection (b) of this section, upon the request of a duly authorized representative of the House of Congress or the committee concerned, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) Before issuing an order under subsection (a) of this section, a United States district court shall find that—

(1) in the case of a proceeding before either House of Congress, the request for such an order has been approved by an affirmative vote of a majority of the Members present of that House;

(2) in the case of a proceeding before a committee or a subcommittee of either House of Congress or a joint committee of both Houses, the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee; and

(3) ten days or more prior to the day on which the request for such an order was made, the Attorney General was served with notice of an intention to request the order.

(c) Upon application of the Attorney General, the United States district court shall defer the issuance of any order under subsection (a) of this section for such period, not longer than twenty days from the date of the request for such order, as the Attorney General may specify. (Added Pub. L. 91-452, title II, § 201(a), Oct. 15, 1970, 84 Stat. 928.)

## EFFECTIVE DATE

Section effective on the sixtieth day following Oct. 15, 1970, see section 260 of Pub. L. 91-452, set out as a note under section 6001 of this title.

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## United States Senate

SELECT COMMITTEE ON  
 PRESIDENTIAL CAMPAIGN ACTIVITIES  
 (PURSUANT TO S. RES. 60, 80 CONGRESS)

WASHINGTON, D.C. 20510

### MEMORANDUM OF LAW

#### Congressional Immunity for Witnesses\*

##### I. Introduction

It has long been recognized that immunity is a useful and necessary tool to uncover and prosecute crime. See, e.g., Lord Chancellor Macclesfield's Trial, 16 Howell's State Trials 767, 1147 (1725); 8 Wigmore, Evidence sec. 2281, at 492 n.2 (McNaughton rev. ed. 1961). (Immunity statute enacted by Parliament to aid in its investigation of the Lord Chancellor Macclesfield,) Mr. Justice White, concurring in Murphy v. Waterfront Commission, 378 U.S. 52, 94-95 (1964), observed that immunity statutes:

"have for more than a century been resorted to for the investigation of many offenses, chiefly those whose proof and punishment were otherwise impracticable, such as political bribery, extortion, gambling, consumer frauds, liquor violations, commercial larceny, and various forms of racketeering."

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\*This memorandum supplements an earlier memorandum submitted to this Committee respecting procedures for granting immunity

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Mr. Justice Frankfurter has said that immunity statutes have "become part of our constitutional fabric," Ullman v. United States, 350 U.S. 422, 438 (1956), and the Supreme Court, in the recent case of Kastigar v. United States, 406 U.S. 441, 446 (1972), recognized that immunity is often necessary because "many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime."

## II. Historical Background

The power of the Government to compel a person to testify before governmental bodies has its origins in early common law. For example, the power with respect to courts was established in England by statute over four hundred years ago, Statute of Elizabeth, 5 Eliz. I, c. 9, sec. 12 (1562). The power to compel testimony, however, is limited in this country by the Fifth Amendment privilege against compulsory self-incrimination and a similar privilege also exists in British law. The Fifth Amendment privilege protects a witness against disclosures which could be used in a criminal prosecution against him or could lead to evidence which could be used in such a prosecution. This privilege may be asserted in any proceeding, civil or criminal, judicial

Page 3

or otherwise. The scope of the Fifth Amendment privilege is limited, in turn, by the power of the Government to grant immunity from prosecution, (or "indemnity" as the English call the concept). See generally Leonard W. Levy, Origins of the Fifth Amendment at 328 , 495 (Oxford U. Press 1968). In fact, immunity is about as old as the privilege against self-incrimination. Id.

The first Congressional immunity statute was passed in 1857, Act of Jan. 24, 1857, 11 Stat. at Large 155. The specific purpose behind the enactment of this statute was to compel witnesses to testify before a Congressional investigation into alleged corruption within the House of Representatives. Under that Act, witnesses could acquire immunity simply by testifying before a Congressional Committee. The immunity conferred by the Act was "transactional" immunity, which meant that by testifying a witness could completely immunize himself from prosecution for the transaction about which he testified. This kind of immunity was tantamount to a pardon. The resulting "immunity baths" during the next five years prompted Congress to reform the immunity statute. A new immunity statute was passed which provided only "use" immunity. Under the new statute the testimony actually given before Congress could not be used against the witness in a subsequent prosecution,

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though the witness could still be prosecuted. Act of January 24, 1862, 12 Stat. at Large 333. However, as this reformed statute was drafted, evidence derived from, or the fruit of, a witness' compelled testimony could be used to prosecute him, even though the actual compelled testimony could not be used against him.

A statute similar in all essentials to the Act of January 24, 1862 was attacked in Counselman v. Hitchcock, 142 U.S. 547 (1892). The Supreme Court held that the limited immunity statute there involved was unconstitutional in that it did not bar the use of the fruits of the testimony as well as the testimony itself. There was dictum in the case, however, which said that an immunity statute must "afford absolute immunity against future prosecution for the offense to which the question relates." Id. at 586. Within three weeks after Counselman was decided, Congress began to amend its immunity statutes to confer transactional immunity in order to comply with the broad dictum in that case. However, Congress did not get around to amending the Act of Jan. 24, 1862 -- which applied to Congressional investigations -- until the Immunity Act of 1954, which was codified in 18 U.S.C. sec. 3486. Under that statute (now repealed) Congress' immunity power was limited to national security investigations.

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In spite of the fact that many federal statutes after Counselman offered total transactional immunity, the Supreme Court, in Murphy v. Waterfront Commission, 378 U.S. 52 (1964), suggested that the broad dictum of Counselman was not the law. In that case, which involved a state immunity statute, the Supreme Court held that a witness in a state proceeding may be constitutionally compelled to give testimony incriminating under federal law as long as the Federal Government is prohibited from making any use of the compelled testimony or its fruits. 378 U.S. at 79. The Federal Government could still prosecute, but it could not use a witness' compelled testimony (or evidence derived from that compelled testimony) against him.

### III. Congressional Immunity - 1970

After careful study, the National Commission on Reform of Federal Criminal Laws recommended that the federal immunity laws be reformed. The Commission concluded that a narrow, use immunity provision such as considered in the Murphy case would meet constitutional requirements. See Commission Working Papers at 1446 (1970).

Congress agreed, and in 1970 enacted the immunity provisions of the Omnibus Crime Control Act of 1970, codified at 18 U.S.C. sec. 6001 through 6005, which

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include the provisions relevant to the Select Committee's operations. These immunity provisions only provide that a witness' compelled testimony, or any information derived directly or indirectly from such compelled testimony, may not be used against him in a subsequent criminal prosecution. The witness may still be prosecuted, however, using independently derived evidence.

The narrow use immunity provided for in 18 U.S.C. sec. 6001 et seq. was attacked as unconstitutional in Kastigar v. United States, 406 U.S. 441 (1972). The petitioners argued, inter alia, that, in order to compel a witness to testify, it was necessary to confer full, transactional immunity, narrow use immunity being insufficient. The Supreme Court disagreed and upheld the constitutionality of the statute:

"We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege."  
406 U.S. at 453.

"The statute, like the Fifth Amendment, grants neither pardon nor amnesty. Both the statute and the Fifth Amendment allow the government to prosecute using evidence from legitimate independent sources." 406 U.S. at 461.

Kastigar involved testimony before a Grand Jury, but there is nothing in the logic or language of the

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case that would make constitutionality depend on whether a Grand Jury or a Congressional Committee is seeking testimony.

The legislative history of the immunity provisions of section 6001 et seq. is useful in explaining its operation and intent. H.R., Rep. No. 91-1549, 91st Congress, 2nd Session (found in 2 U.S. Code Cong. and Admin. News 4017-18 (1970)) states that:

"Section 6002 contains the basic immunity . . . authorization . . . . The witness must claim his privilege to receive immunity. The proposed provision is not an immunity bath. See United States v. Monia, 63 S.Ct. 409, 317 U.S. 424, 87 L. Ed. 376 (1943). Refusal to testify following communication of the immunity order warrants contempt proceedings. No oral testimony or other information secured from a witness can be used against him in a criminal proceeding. This statutory immunity is intended to be broad as, but no broader than, the privilege against self-incrimination. (See Senate hearings at p. 326.) It is designed to reflect the use-restriction immunity concept of Murphy v. Waterfront Commission, . . . rather than the transaction immunity concept of Counselman v. Hitchcock, . . . . The witness is also protected against the use of evidence derivatively obtained . . . . The exception for perjury, false statements or other failure to comply with the order is probably unnecessary. See United States v. Monia, . . . .

\* \* \* \* \*

"Section 6005 sets out the procedure to be followed in congressional proceedings. A court order must be obtained based on an affirmative vote of a majority of members present in a proceeding before either House or a two-thirds vote of the members of the full committee in a proceeding before a committee.



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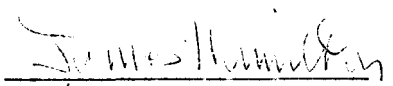
Ten days' notice must be given to the Attorney General prior to seeking the order. The court must defer issuance up to 20 days at the Attorney General's request. However, The Attorney General is not given veto power. Nor is the court given any power to withhold the order if the factual prerequisites are met." (Emphasis added)

The reason the Attorney General is given a right to ten days notice before the request for an immunity order is filed (and the right to a 20 day deferral after the request is made before the order is entered) is to provide the Attorney General with the opportunity to isolate any incriminating data already in his files and thus establish the independent source necessary for later criminal prosecution. See National Commission for the Reform of Federal Criminal Laws, Working Papers at 1406.

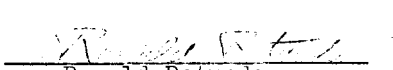
As the above legislative history makes clear, under the statute neither the Attorney General nor the Court has discretion to veto a decision of Congress (or a committee thereof) to grant immunity. If the court determines that the procedural prerequisites have been met (e.g., at least two-thirds of a Committee have voted for immunity and the required notice has been given), it must enter the order. It would have been particularly inappropriate to give the Attorney General power to veto a Congressional decision of immunity "because in a Teapot Dome-type Congressional

Page 2

investigation, the Attorney General himself would be the focus of the inquiry." See Commission Working Papers at 1440. It also follows from the above that, where procedural regularity is present, a prospective witness cannot prevent the grant of immunity. In re McElrath, 248 F.2d 612, 617 (D.C. Cir. 1957) (en banc) (concurring opinion).

  
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June, 1973

  
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## United States Senate

SELECT COMMITTEE ON  
 PRESIDENTIAL CAMPAIGN ACTIVITIES  
 (PURSUANT TO S. RES. 40, 90 CONGRESS)

WASHINGTON, D.C. 20510

### MEMORANDUM OF LAW

#### Attorney-Client Privilege

##### I. The Basic Rule

Professor Wigmore summarizes the basic rule governing the application of the attorney-client privilege as follows:

"(1) where legal advice of any kind is sought  
 (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." 8 Wigmore, Evidence, § 2292, at 554 (McNaughton rev. 1961) (footnote omitted; emphasis in original omitted).

The attorney-client privilege is governed by statute in many states, but for the most part the statutes are merely declaratory of the common law rule summarized above. 8 Wigmore, supra, § 2292 at 556-57. Certain features of the privilege that are or may be relevant to this committee's activities are discussed below.

##### II. The Policy Reasons Behind the Attorney-Client Privilege

Certain evidentiary rules, e.g., the hearsay rule, exist in order to exclude from the jury evidence which the law considers untrustworthy. The attorney-client privilege, on the other hand, excludes perfectly competent, valid evidence because of a policy decision that the exclusion promotes another valid objective of law:

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"In order to promote freedom of consultation of legal advisors by clients, the apprehension of compelled disclosure by the legal advisors must be removed; hence the law must prohibit such disclosure except on the client's consent." 8 Wigmore, supra § 2291 at 545.

Because the exercise of this privilege conflicts with the search for truth, the commentators and the courts have long held that the privilege "ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." 8 Wigmore, supra § 2291 at 554. Wigmore's principle has long been recognized by the case law. E.g., Foster v. Hall, 29 Mass. (12 Pick.) 89, 97 (1831): "The rule of Privilege, having a tendency to prevent the full disclosure of the truth, ought to be construed strictly." See also, McCormick, Evidence § § 72,77,86 (1972).

### III. Some Guidelines Governing the Scope of the Attorney-Client Privilege

(A) The first requirement of the attorney-client privilege is that legal advice must be sought. See generally, 8 Wigmore, supra, § 2296 at 566. Thus, communications with an attorney seeking, e.g., his business advice is not within the privilege. United States v. Vehicular Parking, Ltd., 52 F.Supp. 751, 753-54 (D. Del. 1943). However, where the client generally seeks legal advice, the existence of nonlegal, incidental communications between them does not result in loss of the privilege. United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 359

(D. Mass. 1950) (Wyzanski, J). Accord, McCormick, supra, § 88, at 179-80.

(B) A client may not claim the privilege if the communications was in furtherance of a criminal or fraudulent transaction. Wigmore states that the privilege does not attach where the advice is sought for a knowingly unlawful end; it is, however, not necessary, in order to determine that the privilege is invalid, to conclude that the attorney actually became a participant in the client's intended wrong. E.g., A.B. Dick Co. v. Marr, 95 F.Supp. 83, 102 (S.D.N.Y. 1950) (Medina, J.); In re Sawyer's Petition, 229 F2d 805, 808-09 (7th Cir. 1956) (a client's communication to his attorney in pursuit of a criminal or fraudulent act yet to be performed is not privileged in any judicial proceeding). 8 Wigmore, supra, § 2298, at 573, 577. Wigmore also declares that the intended, unlawful end, may be either a crime or any "deliberate plan to defy the law and oust another person of his rights, whatever the precise nature of those rights may be." Id. at 577. The traditional common law view, however, requires that the communication be in furtherance of a crime or fraud before the privilege is ruled nonexistent. McCormick, supra, § 96 at 201. Rule 26 (2) of the Uniform Rules of Evidence appears to agree with Wigmore and would

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deny the privilege if the communications were in furtherance of any crime or tort, but proposed Federal Rule 503 (d) (1), of the Proposed Rules of Evidence for the United States Federal District Courts, uses the "crime or fraud" language.\*

In order to determine if the legal advice was tainted and is thus not within the privilege the test is as follows:

"Where there is some evidence of crime or fraud apart from the communications with the attorney, and there have been transactions with him, let the burden be on the attorney to satisfy the court (apart from the jury) that the transaction has to his best belief not been wrongful, before the claim of privilege is allowed." Wigmore, supra, § 2299, at 578 (emphasis in original).

See also, Pollock v. United States, 202 F.2d 281, 286 (5th Cir. 1953), cert. denied, 345 U.S. 993 (1953):

"Where the party is being tried for a crime in furtherance of which the communication to the attorney was made and evidence has been introduced giving color to the charge, it is well settled that the communication is no longer privileged.7 citations omitted7."

In short, it is not necessary that the court make a finding that the client's purpose was in fact criminal: if there is

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\* Proposed Rules of Evidence for the United States Federal District Courts were promulgated on November 20, 1972 by the Supreme Court. They have not yet been enacted. A copy of proposed Rule 503 is attached to this Memorandum. The Advisory Committee's Note to Proposed Rule 503 may be found at 56 F.R.D. 235-40.

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some evidence giving color to the charge, the privilege must yield. In determining whether the client had an unlawful purpose in consulting with an attorney, it is the client's guilty intention which is controlling; the good faith or lack thereof of the attorney is irrelevant. McCormick, supra, § 95, at 200. Evidence of the client's wrongful intent may be circumstantial. Id. at n. 51, citing Sawyer v. Stanley, 241 Ala. 39, 1 So. 2d 21 (1941).

(C) If a client tells the attorney about the contents of a preexisting document, the attorney may not ordinarily be forced to testify about such conversations, even though the client may be compelled to testify as to the contents of documents as well as required to produce them. Wigmore, supra, § 2308. However, if the communications were part of an attempt by the client to avoid production of the document's contents, the privilege does not apply. Id. at 596. It is also generally true that information regarding the existence, execution or place of custody of a document is ordinarily not within the privilege. Wigmore, supra, § 2309.

Communications about documents should be distinguished from the documents themselves. A document never acquires any privileged character by virtue of being passed from a client to his attorney, and thus client documents in the possession of an attorney are subject to subpoena. Falsone

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v. United States, 205 F.2d 734, 739 (5th Cir. 1953); McCormick, supra, § 89, at 185.

(D) The purpose of the attorney-client privilege is to protect confidential communications. Communications to a lawyer not intended to be confidential are not protected. E.g., United States v. Tellier, 255 F.2d 441 (2d Cir. 1958); see generally, 8 Wigmore, supra, § 2311, at 600. Thus, communications to an attorney in the presence of a third person who is not the agent of either the attorney or client are not privileged. 8 Wigmore, supra, at 601-02. If the client intends that the lawyer reveal the conversations to third persons there is no privilege. E.g., United States v. Tellier, 255 F.2d 441 (2d Cir. 1958) (Attorney's advice to client not privileged where client expected attorney to prepare letter to third person setting forth client's position). Wilcox v. United States, 231 F.2d 384 (10th Cir. 1956) cert. denied, 351 U.S. 943 (1956) (client's private instructions to attorney that at preliminary hearing he should propound certain questions to witnesses not privileged).

(E) If two (or more) clients retain the same attorney and then have an altercation, there is, in a subsequent controversy between the two clients, no attorney-client privilege regarding conversations by either to the joint attorney. 8 Wigmore, supra, § 2312 at 604. And, in any dispute between a lawyer and his former client (e.g., a suit for fees), the previous communications between the



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lawyer and client are not privileged. Id. at 607-08. An attorney must be able to protect himself against charges by his former client, who may not shield himself by use of the privilege. When the client and attorney become embroiled in a controversy, "the seal is removed from the attorney's lips." McCormick, supra, § 91 at 191. See also A.B.A. Code of Professional Responsibility, D.R. Rule 4-101 (c).

"A lawyer may reveal... (3) Confidences or secrets necessary... to defend himself... against an accusation of wrongful conduct."

(F) If the client, by mistake or otherwise, discloses the substance of his confidential conversations to outsiders, his privilege as to those conversations is lost for all time. E.g., Connecticut Mutual Life Ins. Co. v. Shields, 18 F.R.D. 448, 451 (S.D.N.Y. 1955).

"Once there has been disclosure to an outsider, by the client or by the attorney with the client's authority, of the confidential communication it is no longer privileged."

See also, McCormick, supra, § 93, at 197. Even if the outsider learns of the conversations because there were insufficient precautions to preserve secrecy, the privilege is still lost. 8 Wigmore, § 2326 at 633. Moreover, under traditional principles, if the attorney loses written confidential communications or they are stolen from his office, the privilege is nonetheless extinguished as to their contents since the confidentiality has been lost, albeit involuntarily. See also, McCormick, supra, § 75 n. 19. However, Proposed Federal Rule 503 would prohibit loss or theft from destroying the privilege.

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See Advisory Committee's Note, 56 F.R.D. at 238.

(G) The Attorney-Client privilege may not be used to keep secret the identity of a client:

"The weight of authority denies the privilege for the fact of consultation or employment, including the component facts of the identity of the client, such identifying facts about him as his address, and occupation, the identity of the lawyer, and the scope or object of the employment." McCormick, supra, § 90, at 185-86 (footnote omitted).

(H) The client may voluntarily waive the attorney-client privilege. If he does so, the attorney must testify since the privilege belongs only to the client, not to the attorney. See 8 Wigmore, § 2327. A client may also be found to have waived the privilege if he makes a partial disclosure. Having revealed a portion of his communications, he may not withhold the remainder. 8 Wigmore, supra, § 2327, at 636; McCormick, supra, § 93.

(I) Under traditional common law, the attorney-client privilege protects the relationship between a lawyer and his private client and does not extend to communications to an attorney representing the Government or Governmental officials regarding their official duties. McCormick, supra, § 88, at 181. There are several reasons for limiting the privilege to the private client and his private lawyer. In the Government there is not so much an attorney-client relationship as an employee-employer relationship, which serves to provide the necessary

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degree of confidentiality for the employer. More importantly, the employer is not the actual client of the Government lawyer. It is the people who not only pay the Government lawyer's salary but who are supposed to be the beneficiaries of his legal work and his true client. Thus, the Government lawyer unlike a private one, may take an oath to uphold the Constitution and laws thereunder. The Code of Professional Responsibility also applies differently to a Government lawyer, for his duty is to the public at large and not to a narrow client interest. See, e.g., A.B.A. Code of Professional Responsibility, D.R. Rule 7-103. Finally, in the executive branch of Government, any necessary confidentiality is provided by Executive Privilege. When that privilege is waived, the only privilege of confidentiality that the Executive has is waived. However, some recent cases have extended the privilege to cover lawyers for a government. E.g., Connecticut Mutual Life Ins. Co. v. Shields, 18 F.R.D. 448, 450-51 (S.D.N.Y. 1955) (without stating its reasons, the court states that lawyers for the Bellevue Bridge Commission are covered by the privilege insofar as the Commissioners' communications were only with their lawyers). Proposed Federal Rule 503 (a) (1), if enacted would change the traditional law and apply the privilege to attorneys for governmental bodies. See 56 F.R.D. at 237.

(J) The attorney-client privilege is generally considered to apply to corporations and unincorporated associations.

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E.g., Radiant Burners, Inc. v. American Gas Association, 320 F.2d 314 (7th Cir. 1963), cert. denied, 375 U.S. 921.

However, not every employee of a corporation speaks for it for purposes of the privilege. It is the general rule that when the client is a corporation only members of the "control group" of the corporation are clients for purposes of the privilege. The "control groups" are those who are authorized to seek, and act upon, legal advice for the corporation. See City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483 (E.D. Pa. 1962). Lower-level employees are not "clients;" they fall in the category of witnesses, and information communicated by them to an attorney is not privileged. See generally, D.I. Chadbourne, Inc. v. Superior Court, 36 Cal. Repr. 468, 60 Cal. 2d 723, 388 P. 2d 700 (1969) (statement of corporate employee delivered to corporation's insurance carrier is not privileged).

(K) In any dispute before the Select Committee as to the applicability of the Attorney-Client privilege, the Chair will have to make a ruling. If the Chair rules that the privilege does not apply, the attorney-witness must then answer, even if his client maintains his objections:

"It seems clear that, unless in a case of flagrant disregard of the law by the judge, the lawyer's duty is merely to present his view that the testimony is privileged; and if the judge rules otherwise, to submit to his decision." McCormick, § 92, at 193-94 (footnote omitted).

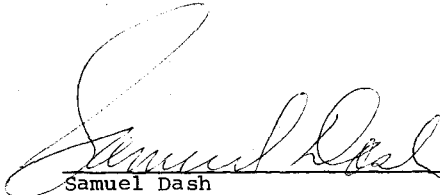
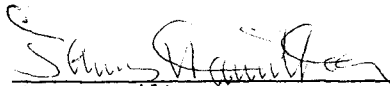
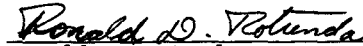
See 8 Wigmore § 2321 at 630; see also A.B.A. Code of Professional Responsibility, D.R. Rule 4-101 (c):

"A lawyer may reveal... (2) Confidences or secrets

-11-

when... required by law or court order."

It would be unfair to require the lawyer to risk contempt for his client.

  
\_\_\_\_\_  
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James Hamilton  
Assistant Chief Counsel  
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Ronald D. Rotunda  
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June, 1973

**Rule 503. Lawyer-Client Privilege**

(a) *Definitions.*—As used in this rule:

(1) A “client” is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

(2) A “lawyer” is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(3) A “representative of the lawyer” is one employed to assist the lawyer in the rendition of professional legal services.

(4) A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) *General rule of privilege.*—A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer’s representative, or (2) between his lawyer and the lawyer’s representative, or (3) by him or his lawyer to a lawyer representing

## RULES OF EVIDENCE •

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another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

(c) *Who may claim the privilege.*—The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. His authority to do so is presumed in the absence of evidence to the contrary.

(d) *Exceptions.*—There is no privilege under this rule:

(1) *Furtherance of crime or fraud.*—If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or

(2) *Claimants through same deceased client.*—As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by *inter vivos* transaction; or

(3) *Breach of duty by lawyer or client.*—As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer; or

(4) *Document attested by lawyer.*—As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) *Joint clients.*—As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

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## United States Senate

SELECT COMMITTEE ON  
 PRESIDENTIAL CAMPAIGN ACTIVITIES  
 (PURSUANT TO S. RES. 11, 91ST CONGRESS)

WASHINGTON, D.C. 20510

### PRELIMINARY

### MEMORANDUM TO SELECT COMMITTEE

### RE CONGRESSIONAL POWER TO SUBPOENA DOCUMENTS IN WHITE

### HOUSE CUSTODY

President Nixon, in his letter of July 6, 1973 (attached) has refused to permit The Select Committee access to papers prepared or received by his personal staff, which papers he has termed "Presidential papers." Though he has declined to use the term, he is, in fact, asserting the doctrine of executive privilege as to all "the private papers of his office, prepared by his personal staff" in order, it is said, that his personal staff may "communicate among themselves in complete candor."<sup>1</sup>

There is substantial debate among legal scholars as to whether executive privilege has any legal existence. Professor Raoul Berger had contended quite forcefully that there is no such concept. See generally, Berger, Executive Privilege

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1. Perhaps because he has already waived executive privilege as to testimony of his staff, the President ostensibly bases his refusal to produce Presidential papers on the doctrine of separation of powers, but his arguments sound in executive privilege terms.



<sup>1</sup>  
v. Congressional Inquiry, 12 U.C.L.A.L.Rev. 1044 (1965).

Other authorities, however, contend that some sort of executive privilege should be recognized. See Kramer & Marcuse, Executive Privilege -- A Study of the Period 1953-1960, 29 Geo. Washington L. Rev. 623, 827 (1961). No federal court has ever been directly presented with the proposition of law<sup>2</sup> advocated by Mr. Nixon, and consequently there is no legal precedent in his favor. However, it is not necessary to settle the debate as to whether executive privilege actually exists for it appears that in no event would it be applicable in the instant case.

First, it is reasonable to conclude that the privilege has been waived: presidential aides and former aides have been allowed to testify in full regarding the Watergate affair without any assertion of the privilege; presidential documents in the possession of witnesses have been submitted

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1. See further, 93 Cong. Rec. 40-41 (1930) (Remarks of Senator, later Justice, Black); 3 Hinds' Precedents of the House of Representatives at 185, quoting House Report No. 271(1844):

"Thus it appears that there exists no rule which would exclude any evidence from the House or a Committee of the House, which are as competent to guard the interests of the State, and have as high motives for doing so as the Executive can have."

2. It is worth noting, that a like issue has been decided by at least one state court. Opinion of the Justices, 328 Mass. 655, 660-61, 102 N.E. 2d 79, 85(1951):

"The attempt of the Senate to secure such information as might be contained in the report was not an interference with the executive department of the government in violation of art. 30 of the Declaration of Rights, relating to separation of powers...

... It was a permissible exercise of an attribute pertaining to legislative power." (emphasis added.)

to the Select Committee without any claim to privilege. Mr. Nixon has "opened the door" to evidence and it is now difficult for him to argue that presidential documents regarding Water-<sup>1</sup>gate may be withheld.

In this regard, it is worth noting that the distinction between testimonial and documentary evidence which the letter of July 6, 1973, attempts to draw is unpersuasive. The letter (at p.2) contends that testimonial evidence "can, at least, be limited to matter within the scope of the investigation." (However, the President recognizes that the oral testimony will be, in fact, "unrestricted.") But the letter fails to recognize that documentary evidence can also be restricted. Any

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I. See Kramer & Marcuse, Executive Privilege--A Study of the Period 1953-1960, 29 Geo. Washington L. Rev. 827, 901 (1961), noting that at the time of the Army-McCarthy hearings it was felt that certain information would have been privileged "had not the Administration opened the door by volunteering information about it." The waiver principle is well-recognized in the law. See Tigar, Foreward: Waiver of Constitutional Rights: Disquiet in the Citadel, 84 Harv. L. Rev. 1 (1970):

"Voluntary disclosure of any such fact (which may in any degree form a link in a chain of evidence against the witness) evinces, the argument runs, an intention not to rely upon the privilege, at least not in that forum, and not with respect to the entire subject matter to which the initial disclosure relates. The same general rule is followed with respect to all testimonial privileges, constitutionally-based or not, including the lawyer-client, clergy man-penitent, and doctor-patient privileges." Id. at 9-10 (citing Preliminary Draft of Proposed Rules of Evidence for the U.S. District Courts) (emphasis added).

Select Committee subpoena can be carefully drawn so that it is, in the letter's terms, "limited to matters within the scope of the investigation." If a particular document covers matters both within and outside of the investigation, the irrelevant parts can be excised. There is, in short, no reason to draw a distinction between documentary and testimonial evidence and waiver of rights as to the former<sup>1</sup> should also result in waiver as to the latter.

The second reason that executive privilege is inapplicable in the present circumstances is that the doctrine may not be used as a device to conceal information relating to the commission of a crime. Serious charges of criminal misconduct at the highest level of government have been made before the Select Committee. Certain files presently in the custody of the White House may support or rebut the charges. Such highly relevant information may not be shielded from the public on grounds of executive privilege.

President Nixon's prior statements on the privilege appear to support this conclusion. In his Guidelines of May 3, 1973, he defined Presidential papers as "all documents produced or received by the President or any member of the White House staff in connection with his official duties."

---

1. Moreover, as noted, some Presidential documents regarding Watergate have been received without Presidential objection.

(emphasis added). But no document produced or received in furtherance of a crime may be justifiably considered one resulting from an exercise of an official duty. See also the Presidential Press Release of May 22, 1973, at 8:

"Executive Privilege will not be invoked as to any testimony concerning possible criminal conduct or discussion of possible criminal conduct in the matters presently under investigation, including the Watergate affair and the alleged cover-up."

The case law supports the use of a subpoena to the President to achieve relevant information regarding the commission of crimes. Chief Justice Marshall, in United States v. Burr, 25 Fed. Cas. at 187 (No. 14964) (C.C. Va. 1807), with respect to relevant evidentiary documents in the custody of the President, stated:

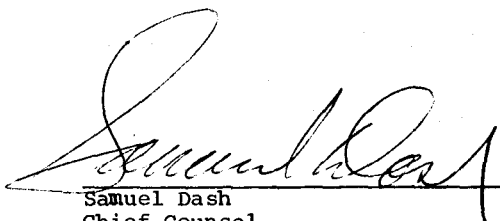
"That the President of the United States may be subpoenaed, and examined as a witness, and required to produce any paper in his possession, in not controverted."

Though the Burr case is an old one, it is still good law as evidenced by the Supreme Court's favorable citation in Branzburg v. Hayes, 408 U.S. 665, 689 n. 26 (1972). The

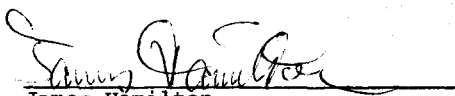
- 
1. The "precedents" cited by Mr. Nixon are not sufficiently delineated to allow comment on each, but we know of no incident where a President, faced with compelling evidence that crimes have been committed, has invoked the privilege to withhold documents that might bear on these or other criminal violations. See generally Berger, Executive Privilege v. Congressional Inquiry, 12 U.C.L.A. L.Rev. 1044 (1965).

Court also quoted with approval Jeremy Bentham's observation:


"Were the Prince of Wales, The Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach, while a chimney-sweeper and a barrow-woman were in dispute about a halfpenny worth of apples, and the chimney-sweeper or the barrow-woman were to think it proper to call upon them for their evidence, could they refuse it? No, most certainly." 408 U.S. at 689 n. 26.



Samuel Dash  
Chief Counsel



James Hamilton  
Assistant Chief Counsel



Ronald D. Rotunda  
Assistant Counsel

July 10, 1973

## THE WHITE HOUSE

WASHINGTON

The Western White House  
San Clemente

July 6, 1973

Dear Mr. Chairman:

I am advised that members of the Senate Select Committee have raised the desirability of my testifying before the Committee. I am further advised that the Committee has requested access to Presidential papers prepared or received by former members of my staff.

In this letter I shall state the reasons why I shall not testify before the Committee or permit access to Presidential papers.

I want to strongly emphasize that my decision, in both cases, is based on my Constitutional obligation to preserve intact the powers and prerogatives of the Presidency and not upon any desire to withhold information relevant to your inquiry.

My staff is under instructions to co-operate fully with yours in furnishing information pertinent to your inquiry. On 22 May 1973, I directed that the right of executive privilege, "as to any testimony concerning possible criminal conduct or discussions of possible criminal conduct, in the matters presently under investigation," no longer be invoked for present or former members of the White House staff. In the case of my former Counsel, I waived in addition the attorney-client privilege.

These acts of cooperation with the Committee have been genuine, extensive and, in the history of such matters, extraordinary.

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The pending requests, however, would move us from proper Presidential cooperation with a Senate Committee to jeopardizing the fundamental Constitutional role of the Presidency.

This I must and shall resist.

No President could function if the private papers of his office, prepared by his personal staff, were open to public scrutiny. Formulation of sound public policy requires that the President and his personal staff be able to communicate among themselves in complete candor, and that their tentative judgments, their exploration of alternatives, and their frank comments on issues and personalities at home and abroad remain confidential. I recognize that in your investigation as in others of previous years, arguments can be and have been made for the identification and perusal by the President or his Counsel of selected documents for possible release to the Committees or their staffs. But such a course, I have concluded, would inevitably result in the attrition, and the eventual destruction, of the indispensable principle of confidentiality of Presidential papers.

The question of testimony by members of the White House staff presents a difficult but different problem. While notes and papers often involve a wide-ranging variety and intermingling of confidential matters, testimony can, at least, be limited to matters within the scope of the investigation. For this reason, and because of the special nature of this particular investigation, I have agreed to permit the unrestricted testimony of present and former White House staff members before your Committee.

The question of my own testimony, however, is another matter. I have concluded that if I were to testify before the Committee irreparable damage would be done to the Constitutional principle of separation of powers. My position in this regard is supported by ample precedents with which you are familiar and which need

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not be recited here. It is appropriate, however, to refer to one particular occasion on which this issue was raised.

In 1953 a Committee of the House of Representatives sought to subpoena former President Truman to inquire about matters of which he had personal knowledge while he had served as President. As you may recall, President Truman declined to comply with the subpoena on the ground that the separation of powers forbade his appearance. This position was not challenged by the Congress.

It is difficult to improve upon President Truman's discussion of this matter. Therefore, I request that his letter, which is enclosed for the Committee's convenience, be made part of the Committee's record.

The Constitutional doctrine of separation of powers is fundamental to our structure of government. In my view, as in the view of previous Presidents, its preservation is vital. In this respect, the duty of every President to protect and defend the Constitutional rights and powers of his Office is an obligation that runs directly to the people of this country.

The White House staff will continue to cooperate fully with the Committee in furnishing information relevant to its investigation except in those instances where I determine that meeting the Committee's demands would violate my Constitutional responsibility to defend the office of the Presidency against encroachment by other Branches.

At an appropriate time during your hearings, I intend to address publicly the subjects you are considering. In the meantime, in the context of Senate Resolution 60, I consider it my Constitutional responsibility to decline to appear personally under any circumstances before your Committee or to grant access to Presidential files.

I respect the responsibilities placed upon you and your colleagues by Senate Resolution 60. I believe you and



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your Committee colleagues equally respect the responsibility placed upon me to protect the rights and powers of the Presidency under the Constitution.

Sincerely,

Honorable Sam J. Ervin, Jr.  
Chairman  
Select Committee on Presidential  
Campaign Activities  
United States Senate  
Washington, D. C. 20510

Enclosure

cc: Honorable Howard H. Baker

November 12, 1953

TRUMAN LETTER

Dear Sir:

I have your subpoena dated November 9, 1953, directing my appearance before your committee on Friday, November 13, in Washington. The subpoena does not state the matters upon which you seek my testimony, but I assume from the press stories that you seek to examine me with respect to matters which occurred during my tenure of the Presidency of the United States.

In spite of my personal willingness to cooperate with your committee, I feel constrained by my duty to the people of the United States to decline to comply with the subpoena.

In doing so, I am carrying out the provisions of the Constitution of the United States; and am following a long line of precedents, commencing with George Washington himself in 1796. Since his day, Presidents Jefferson, Monroe, Jackson, Tyler, Polk, Fillmore, Buchanan, Lincoln, Grant, Hayes, Cleveland, Theodore Roosevelt, Coolidge, Hoover and Franklin D. Roosevelt have declined to respond to subpoenas or demands for information of various kinds by Congress.

The underlying reason for this clearly established and universally recognized constitutional doctrine has been succinctly set forth by Charles Warren, one of our leading constitutional authorities, as follows:

"In this long series of contests by the Executive to maintain his constitutional integrity, one sees a legitimate conclusion from our theory of government. \*\*\*Under our Constitution, each branch of the Government is designed to be a coordinate representative of the will of the people. \*\*\*Defense by the Executive of his constitutional powers becomes in very truth, therefore, defense of popular rights--defense of power which the people granted to him.

"It was in that sense that President Cleveland spoke of his duty to the people not to relinquish any of the powers of his great

## TRUMAN LETTER

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office. It was in that sense that President Buchanan stated the people have rights and prerogatives in the execution of his office by the President which every President is under a duty to see 'shall never be violated in his person' but 'passed to his successors unimpaired by the adoption of a dangerous precedent.' In maintaining his rights against a trespassing Congress, the President defends not himself, but popular government; he represents not himself but the people."

President Jackson repelled an attempt by the Congress to breakdown the separation of powers in these words:

"For myself I shall repel all such attempts as an invasion of the principles of justice as well as the Constitution, and I shall esteem it my sacred duty to the people of the United States to resist them as I would the establishment of a Spanish Inquisition."

I might commend to your reading the opinion of one of the committees of the House of Representatives in 1879, House Report 141 March 3, 1879, Forty-fifth Congress, Third Session, in which the House Judiciary Committee said the following:

"The Executive is an independent of either house of Congress as either house of Congress is independent of him, and they cannot call for the records of his actions, or the action of his officers against his consent, any more than he can call for any of the journals or records of the House or Senate."

It must be obvious to you that if the doctrine of separation of powers and the independence of the Presidency is to have any validity at all, it must be equally applicable to a President after his term of office has expired when he is sought to be examined with respect to any acts occurring while he is President.

The doctrine would be shattered, and the President, contrary to our fundamental theory of constitutional government, would become a mere arm of the Legislative Branch of the Government if he would feel during his term of office that his every act might be subject to official inquiry and possible distortion for political purposes.

TRUMAN LETTER

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If your intention, however, is to inquire into any acts as a private individual either before or after my Presidency and unrelated to any acts as President, I shall be happy to appear.

Yours Very Truly,

HARRY S. TRUMAN

Honorable Harold H. Velde  
Chairman  
Committee on Un-American Activities  
House of Representatives  
Washington, D. C.

SAM J. ERVIN, JR., N.C., CHAIRMAN  
 HOWARD H. BAKER, JR., TENN. VICE CHAIRMAN  
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SAMUEL DASH  
 CHIEF COUNSEL AND STAFF DIRECTOR  
 FRED D. THOMPSON  
 MINORITY COUNSEL  
 RUPUS L. EDMISTEN  
 DEPUTY COUNSEL

## United States Senate

SELECT COMMITTEE ON  
 PRESIDENTIAL CAMPAIGN ACTIVITIES  
 (PURSUANT TO S. RES. 40, 93D CONGRESS)  
 WASHINGTON, D.C. 20510

### Memorandum of Law

#### The Hatch Act

#### Table of Contents

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The Hatch Act governs a wide range of political behavior on the part of certain federal, state and local government employees. The purpose of this memorandum is to review certain provisions of the Act which are relevant to Presidential elections. The discussion is divided into four parts. Part I summarizes the legislative history of the Act and its amendments.

Part II deals with section 9 (a) of the Act which prohibits certain federal employees from taking an active part in political management or in political campaigns.

Part III covers section 2 of the Act dealing with interference with federal elections by administrative employees of federal, state, or territorial governments; section 3 dealing with the promise of employment or other benefits for political activity; and section 4 dealing with the deprivation of employment or other benefits for political activity.

Part IV is a discussion of the constitutionality of the Hatch Act with particular emphasis on the recent Supreme Court decision in United States Civil Service Commission v. National Association of Letter Carriers.

#### I. Legislative History

Thomas Jefferson first imposed restrictions upon the political activity of federal officials in 1801, and although subsequent Presidents issued executive orders restricting political activity of

various federal employees, it was not until 1907 that President Theodore Roosevelt extended such restrictions to employees in the competitive classified service. Roosevelt's executive order did not specifically enumerate the acts prohibited, but since it permitted an employee to express his political views only in private, it was more severe than the provisions now contained in the Hatch Act. The executive order later became Civil Service Rule I, a provision which was the subject of some 3,000 adjudications by the Civil Service Commission before enactment of the Hatch Act in 1939. The Civil Service rule dealt with the political activity of civil servants as follows:

Rule I. No person in the executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the results thereof. Persons who by the provisions of these rules are in the competition classified service, while retaining the right to vote as they please and express privately their opinions on political subjects shall take no active part in political management or in political campaigns. (emphasis added)

The political activity of government employees again came under scrutiny in 1936 when Congress faced criticism that politics was influencing administration of the Emergency Relief Appropriation Act of 1936. The administrator of the Works Progress Administration (WPA) responded to the criticism by issuing a directive to WPA state administrators that candidates for or holders of elective office should not be employed on administrative staffs of the WPA.

To further implement the administrator's policy, Senator Bilbo introduced an amendment to H.R. 12624 which adopted the substance of the directive. The amendment passed and was incorporated into subsequent Emergency Relief Appropriation Acts.

In 1937, Senator Carl Hatch proposed an amendment to the Works Progress Administration (WPA) appropriations bill which would have prohibited federal employees in administrative positions from using their influence to interfere with conventions, primaries or other elections. The amendment also provided that "any such person shall retain the right to vote as he pleases and to express his opinions on all political subjects, but shall take no active part in political management or political campaigns." The amendment was an attempt to apply to holders of administrative positions in the WPA the same restrictions imposed on civil service employees under Civil Service Rule I. Although the wording used in the amendment later became section 9 of the Hatch Act, the amendment was defeated in the Senate on June 2, 1938. Approximately two weeks later on June 16, 1938, the Senate adopted S. Res. 290 which directed the Special Committee to Investigate Senatorial Campaign Expenditures and the Use of Government Funds, chaired by Senator Morris Sheppard, to conduct an investigation of the alleged use of relief and work-relief funds for political purposes. On January 2, 1939, the Sheppard Committee reported that funds appropriated for relief programs had been diverted to political activities. S. Rep. No. 1,



76th Cong., 1st Sess. 1 (1939). Although the Committee made 16 recommendations (attached hereto as Appendix A) as a result of its investigation, it did not suggest prohibiting voluntary political activity.

Immediately after the Sheppard committee reported, Senator Hatch introduced two bills (S. 212 and 213) which he later consolidated into a single bill, S. 1871. Although the bill stated that "[n]o such officer or employee shall take any active part in political management or in political campaigns," it did not specify the activities prohibited. During debate on the Senate floor, the bill was attacked for its inherent lack of clarity. Objections to the bill centered around its adoption of all rulings by the Civil Service Commission under its Rule I prior to passage of the Act. The statute incorporated the findings contained in approximately 3,000 rulings as follows:

[T]he provisions of this Act which prohibit persons to whom such provisions apply from taking any active part in political management or in political campaigns shall be deemed to prohibit the same activities on the part of such persons as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibiting on the part of employees in the classified civil service of the United States by the provisions of the civil-service rules prohibiting such employees from taking any active part in political management or in political campaigns.

Senators objecting to this provision pointed out that no one on the floor of the Senate, not even Senator Hatch, knew what rules and

regulations were contained in the rulings.<sup>\*/</sup> In spite of these objections, S. 1871 passed the Senate on April 13, 1939. As enacted by both Houses of Congress it was entitled "An Act to Prevent Pernicious Political Activity," but it subsequently became known as the Hatch Act. President Roosevelt signed the Act on August 2, 1939 and sent it, along with his interpretation of the law, to Congress. The President contended that the new law was constitutional because the federal government may prescribe qualifications for its employees, but noted that such qualifications cannot interfere with free speech or the right to vote.<sup>\*\*/</sup>

The original version of the Hatch Act dealt with the political activity of government employees as follows:

Sec. 1 makes it unlawful to, or to attempt to, intimidate, threaten, or coerce, any person to affect such person's vote in elections of Federal officers.

\*/ 5 St. Mary's L. Rev. 216, 217 (1973). Senator Minton remarked:

It will not do much good to put into the RECORD the rules and regulations we are writing into the statute, if we do not know what they are. No one on the floors of the Senate, not even the Senator from New Mexico (Senator Hatch), now knows what these rules and regulations are.

86 Cong. Rec. 2940 (1940).

\*\*/ Report entitled "The Hatch Act" by Elizabeth Yadosky, Legislative Attorney, American Law Division, Congressional Research Service 197, 207 (1966). It should be noted that President Roosevelt, before signing the Act, made an unsuccessful attempt to persuade Congress to place administrative employees of the WPA under civil service.

Sec. 2 makes it unlawful for any person employed in any administrative position by the United States to use his official authority for the purpose of interfering with, or affecting the election or nomination of any candidate for Federal elective office.

Sec. 3 makes it unlawful to promise any employment or other benefit, provided for or made possible in whole or in part by any Act of Congress, as consideration for political activity in any election.

Sec. 4 makes it unlawful to, or to attempt or threaten to, deprive any person of any employment or other benefit provided by any Act of Congress appropriating funds for work relief purposes, on account of race, creed, color, or any political activity, support of, or opposition to any candidate or any political party in any election.

Sec. 5 makes it unlawful to solicit funds for political purposes from any person known to be receiving any benefit provided for or made possible by any Act of Congress appropriating funds for work relief or relief purposes.

Sec. 6 makes it unlawful to furnish or disclose or receive a list of names of such persons receiving work relief benefits for political purposes.

Sec. 7 makes it unlawful to use money appropriated under any Act of Congress for work relief for the purpose of inter-

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fering with, restraining, or coercing any individual in the exercise of his right to vote at any election.

Sec. 8 provides that any person who violates any of the foregoing provisions of this Act upon conviction thereof shall be fined not more than \$1,000 or imprisoned for not more than one year, or both.

Sec. 9 makes it unlawful for any person in the executive branch of the Federal Government to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof; provides that no officer or employee of the executive branch shall take any active part in political management or in political campaigns; provides that any person violating this section shall be immediately removed from the position or office held by him.

Sec. 9 (a) makes it unlawful for any person employed in any capacity by any agency of the Federal government to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States; provides that any person violating this section shall be immediately removed from the position or office held by him. (53 Stat. 1147).<sup>\*</sup>

<sup>\*</sup>/Yadlosky, The Hatch Act Prescription Against Participation by State and Federal Employees in Political Management and Political Campaigns: A Legislative History 2 (1973).

In 1940 Senator Hatch offered an amendment to the Act to extend its coverage to state and local officers and employees of federally financed projects. The bill passed the House of Representatives on July 10, 1940 and was signed by the President on July 19, 1940. The Act exempted from its political activity prohibitions local elections in Maryland and Virginia. In addition, it imposed a \$5,000 ceiling on contributions to candidates by any-one other than state and local political committees.<sup>\*/</sup> The Act also placed a prohibition on contributions to any political party or candidate by persons or firms having contracts with the federal government.

In 1942 the Hatch Act was amended to exempt from the political activity prohibitions officers and employees of educational and religious organizations supported in whole or in part by the federal government. In 1948, the 80th Congress enacted into law Title 18 of the United States Code, recodifying and clarifying the sections of the Hatch Act which appeared in that Title. In 1950, the portion of section 9 of the Hatch Act requiring mandatory removal for violations was amended to vest in the Civil Service Commission the discretion to determine whether a violation of the Act justifies removal from office.

<sup>\*/</sup> This provision was repealed by the Federal Election Campaign Act of 1971.

II. Section 9(a)

Section 9(a) of the Hatch Act was designed by Congress to prohibit "pernicious political activities" on the part of certain federal employees.<sup>\*/</sup> This provision, now contained in 5 U.S.C.

§ 7324(a), is probably the most crucial section of the act.<sup>\*\*/</sup>

It provides that an employee in an executive agency or an individual employed by the government of the District of Columbia may not (1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or

<sup>\*/</sup> Hatch Act § 9(a), ch. 410, 53 Stat. 1148 (1939), as amended  
5 U.S.C. § 7324(a) (1970).

<sup>\*\*/</sup> 5 U.S.C. § 7324(a) (1970) provides:

(a) An employee in an Executive agency or an individual employed by the government of the District of Columbia may not--

(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or

(2) take an active part in political management or in political campaigns.

For the purpose of this subsection, the phrase "an active part in political management or in political campaigns" means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.

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(2) take an active part in political management or in political campaigns. The section defines "active part in political management or in political campaigns" as those acts forbidden by the Civil Service Commission prior to 1940 under rules prescribed by the President. This part of the statute incorporates the 3,000 rulings made by the Civil Service Commission under Rule I before July 19, 1940. Although section (a) appears to impose severe restrictions upon the personal freedom of federal employees to participate in the political process, section (b) mitigates the restraints to a certain degree. It provides that an individual to whom section (a) applies retains the right to vote as he chooses and to express his opinion on political subjects and candidates.<sup>\*/</sup>

It should be noted that the Hatch Act provision, contrary to Civil Service Rule I, permits federal employees to express political opinions publicly as well as privately. Unfortunately, the extent of this privilege is somewhat unclear since expressions of opinion may not rise to the level of campaigning. Nonetheless, it is clear that section 7324(a)(2) does not prohibit nonpartisan political activity on the part of employees covered by the section. Political activity is permitted if it arises in connection with:

<sup>\*/</sup> 5 U.S.C. § 7324(b) (1970) provides:

(b) An employee or individual to whom subsection (a) of this section applies retains the right to vote as he chooses and to express his opinion on political subjects and candidates.

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(1) an election and the preceding campaign if none of the candidates is to be nominated or elected at that election as representing a party any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected; or

(2) a question which is not specifically identified with a National or State political party or political party of a territory or possession of the United States.\*/

The tenuous distinction between a permissible expression of opinion and a prohibited act amounting to "an active part in political management or in political campaigns" was considered in Wilson v. United States Civil Service Commission, 136 F. Supp. 104 (D.D.C. 1955). Plaintiff in the case was an employee of the Railway Mail Service of the United States Post Office Department. He had mailed to the Houston Post an unsolicited letter which recommended the defeat of a certain partisan candidate for governor of the state of Texas.

The Civil Service Commission instituted removal proceedings against the plaintiff under Section 9(a) of the Hatch Act, alleging that writing the letter with the intent to have it published constituted participation in a political campaign. The Commission found

\*/ 5 U.S.C. § 7326 (1) & (2). The importance and number of political issues thus excepted, e.g. Sunday movies, local school bond issues, location of local parks, election of local officials in whom no political party is interested, are obviously very small. United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. \_\_\_\_ (1973).



plaintiff in violation of the Act and directed that he be suspended from employment for a period of ninety days. In plaintiff's subsequent action for injunction and declaratory judgment, the District Court for the District of Columbia rejected the Commission's interpretation of section 9 (a). The court held that an isolated, unsolicited, unpaid for expression of opinion which might never have been published does not indicate a premeditated effort to engage in or actively participate in a political campaign. The finding of the court was based on the constitutional protection of free speech as well as the wording of the statute which permits either private or public expression of political opinion by federal employees. Although the conclusion of the court is a sound one, it is doubtful whether the finding can properly be extended beyond the factual situation presented.

In 1939 the coverage of Civil Service Rule I was somewhat limited because only 67.7 percent of civil servants were in the classified civil service. The extension of political activity prohibitions to virtually all employees of the executive branch, imposed by section 9(a), was, therefore, a major extension of President Roosevelt's prior executive order. There are, however, major exceptions to the coverage of section 9(a) as enacted in section 7324(a) of Title 5 of the United States Code. Section 7324 (a) does not apply to any "individual employed by an educational or research institution, establishment, agency or system which is

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supported in whole or in part by the District of Columbia or by a recognized religious, philanthropic, or cultural organization. <sup>\*</sup>/

Section (d), which exempts a number of specific individuals from the restrictions of section (a), provides:

(d) Subsection (a) (2) of this section does not apply to--

(1) an employee paid from the appropriation for the office of the President;

(2) the head or the assistant head of an Executive department or military department;

(3) an employee appointed by the President, by and with the advice and consent of the Senate, who determines policies to be pursued by the United States in its relations with foreign powers or in the nationwide administration of Federal laws;

(4) the Commissioners of the District of Columbia or

(5) the Recorder of Deeds of the District of Columbia.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 525.\*\*/ (emphasis added)

Section (d)(1) has been construed to exempt from section 7324(a) of the Hatch Act all employees of the White House Office only. It does not exempt from coverage competitive service employees working in the White House but not paid from appropriations to the White House Office. Section (d)(3) exempts, among others, ambassadors and ministers appointed by the President with Senate approval, U.S. Representatives and Deputy U.S. Representatives to the United Nations and Bureau Chief positions filled by Presidential appointment subject to Senate confirmation. Included in the latter category are the Treasurer of the United States, Director of the Mint,

\*/ 5 U.S.C. § 7324(c) (1970).

\*\*/ A more complete list of positions which qualify for the statutory exemption is attached hereto as Appendix B.

Chief of the Women's Bureau, Director of the Children's Bureau and the Commissioner of Education. Under certain conditions, heads and members of commissions or task forces created by statute or executive order are also exempted. It is noteworthy, however, that Schedule C Special Assistants to exempted Presidential appointees are not entitled to the general exception.

Persons employed on an intermittent or irregular basis, such as experts or consultants on a per diem basis, are subject to the political activity restrictions of the Hatch Act while in an active duty status only and for the entire 24 hours of any day of actual employment. The employing agency has the duty of enforcement in the cases of those employees in the excepted service. Temporary, part-time and emergency employees are subject to the Hatch Act.

### III. Sections 2,3, and 4.

Section 2 of the Hatch Act, codified in 18 U.S.C. § 595, prohibits certain federal and state employees in administrative positions from using official authority for the purpose of interfering with or affecting the nomination or election of candidates for certain federal offices.<sup>\*/</sup> The prohibition applies only to those employed in connection with any activity which is financed in whole or in part by loans or grants made by the United States or any department or agency thereof. The penalty for violation of the

<sup>\*/</sup> The offices included are President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia, and Resident Commissioner.

section is a \$1,000 fine or imprisonment for one year, or both. Exempted from the section are acts by offices or employees of any educational or research institution or establishment "supported in whole or in part by any state or political subdivision thereof, or by the District of Columbia... or by any recognized religious, philanthropic or cultural organization." There are no cases reported under this section.

Unfortunately, the legislative history of section 595 does not clearly indicate the specific activities prohibited by the provision. Originally, the bill was passed without debate in the Senate, and the views of the House members who debated the bill are so varied that few conclusions can be drawn from them. The Senate debated and concurred in the House amendments after Senator Hatch made assurances that the bill still had the teeth that were in the original Senate version.

Section 3 of the Act, codified in 18 U.S.C. § 600, makes it a misdemeanor to promise employment or other benefit in consideration for political activity or for the support of or opposition to any candidate or any political party in connection with any primary, general or special election. The provision also applies to any political convention or caucus held to select candidates for any political office. The penalty for violation of the provision is a \$1,000 fine or imprisonment for not more than one year, or both.

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Section 4 of the Act, now 18 U.S.C. § 601, makes it a misdemeanor to deprive another of any employment, position, work or other federal relief benefit on account of race, creed, color, or any political activity, or opposition to any candidate or any political party in any election. The penalty for violation of the section is the same as that imposed by section 600.<sup>\*/</sup>

#### IV. Constitutionality

Eight years after passage of the Hatch Act, the Supreme Court decided United Public Workers v. Mitchell, 330 U.S. 75 (1946), the first major case challenging the constitutionality of the Act. Mr. Poole, plaintiff in the case, was an employee of the United States Mint in Philadelphia who had served as a Ward Executive Committeeman for the Democratic Party. While holding this position he had served as a worker at the polls and had assisted in paying the party workers for their services on election day. The Civil Service Commission found that he had taken an "active part in political management or in political campaigns" in violation of section 9(a) of the Hatch Act and issued an order for his removal from federal employment. Plaintiff alleged that enforcement of section 9(a) was violative of his rights under the first, ninth and tenth amendments. The Court acknowledged that the nature of political rights reserved to the people by the ninth and tenth

<sup>\*/</sup>The only reported case under sections 3 and 4 held that primary elections were not covered. This limitation was later removed by the Federal Election Campaign Act of 1971.

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amendments was in issue. The Court also stated that the Hatch Act imposed a "measure of interference" on what otherwise would be the freedom of the civil servant under the first, ninth and tenth amendments. Having recognized the possible infringement of these basic constitutional rights, the Court pointed out the "accepted constitutional doctrine that these fundamental human rights are not absolutes." Balancing the constitutional guarantees of freedom against a congressional enactment designed to free the civil service of the evil of partisan politics, the Court upheld section 9(a) as a permissible mode of regulating the political conduct of its employees.

The Court noted that by accepting the privilege of federal employment an individual sacrifices some of the rights he enjoys as a private citizen. This logic bears out the theme of Mr. Justice Holmes' assertion that "the petitioner may have constitutional right to talk politics, but he has no constitutional right to be a policeman."<sup>\*/</sup>

In Mitchell, the majority of the Court rejected Pooles' contention that section 9(a) violates the fifth amendment because it is so vague and indefinite as to prohibit lawful activities as well as activities which are properly made unlawful by other provisions of law. Justice Black dissented, however, stating that the case should be controlled by earlier first amendment decisions;<sup>\*\*/</sup>

<sup>\*/</sup> McAuliffe v. New Bedford, 155 Mass. 216, 29 N.E. 517 (1892) (dictum).

<sup>\*\*/</sup> Thornhill v. Alabama, 310 U.S. 88 (1940); Marsh v. Alabama, 326 U.S. 501 (1946); Bridges v. California, 314 U.S. 252, 260, 263 (1941).

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Certainly laws which restrict the liberties guaranteed by the First Amendment should be narrowly drawn to meet the evil aimed at and to effect only the minimum number of people imperatively necessary to prevent a grave and imminent danger to the public.\*/

In brief, the majority of the Court in Mitchell concluded that a federal employee, as a recipient of the privilege of public employment, had not been deprived of any rights by the act since he might retain his political freedom merely by rejecting the benefit conferred.

A number of state court cases construing "little Hatch Acts" arose following the decision in Mitchell, but the Supreme Court did not decide another case dealing with the constitutionality of the Hatch Act until the 1973 decision in United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. \_\_\_\_ (1973). The plaintiffs, National Association of Letter Carriers AFL-CIO, and six federal employees alleged that the Hatch Act ban on federal employee political activity \*\*/ violated the freedom of speech guarantee of the first amendment. Specifically, the plaintiffs asserted that the statute was overbroad in its sweep, thus imposing a chilling effect on expression protected by the first amendment. A divided three judge district court held that section 7324 (a) (2) was overbroad and that the government must devise less drastic means of protecting its legitimate interest

\*/ United Public Workers v. Mitchell, 330 U.S. 75, 111 (1946) (dissenting opinion).

\*\*/ 5 U.S.C. § 7324 (a) (1970).

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in assuring a non-partisan civil service.<sup>\*/</sup> The decision was appealed directly to the Supreme Court where it was reversed in a four to three decision. The Court set the tone for its opinion by reiterating its conclusion in Pickering v. Board of Education:

the government has an interest in regulating the conduct and 'the speech of its employees that differ [3] significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interest of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees. 391 U.S. 563, 568 (1968).

The Court stated that employees of the Executive Branch, or of its agencies, should administer the law in accordance with the will of Congress, not in accordance with their own will or the will of a political party, and it noted that a major theme of the Hatch Act is impartial execution of the laws. Upholding the Mitchell case, the Court found that plainly identifiable acts of political management and political campaigning could constitutionally be prohibited on the part of federal employees.

A majority of the Court also rejected appellee's contention that the statute was both unconstitutionally vague and fatally overbroad.

The Court noted that section 15 of the Hatch Act defines "an active part in political management and political campaigns" as

---

<sup>\*/</sup> Nat'l. Ass'n. of Letter Carriers v. Civil Serv. Comm'n, 346 F. Supp. 578, 585 (D.D.C. 1972).



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those activities which had been prohibited prior to 1940 by the Civil Service Commission under Rule I. The District Court had held that section 7324(a) and the definitional addendum of section 15 were insufficient to guide employee behavior because many of the 3,000 adjudications were "undiscoverable, inconsistent, or incapable of yielding any meaningful rules." The Supreme Court took a different view of the statute, holding that the Civil Service Commission's regulations<sup>\*/</sup> were a current and accurate statement of the Statute. Furthermore, the Court addressed itself to these regulations and the statute itself for purposes of determining whether section 7324(a) was unconstitutionally vague or overbroad.

In conclusion, the Court declared that section 7324(a) is a constitutionally permissible method of regulating the political conduct of federal employees. Although Justice Douglas, in his dissenting opinion, held that the "chilling effect of these vague and generalized prohibitions is so obvious as not to need elaboration," the majority reaffirmed the constitutionality of the Act as established in Mitchell.

<sup>\*/</sup> The pertinent regulations, contained in 5 CFR § 733, are attached hereto as Appendix C.

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## APPENDIX A

Report of the Special Committee on Senatorial Campaign Expenditures and Use of Government Funds. S. Rept. No. 1, 76th Cong.

I. The committee in the course of its work has been compelled to give much of its attention to charges of undue political activity in connection with the administration and conduct of the Works Progress Administration in certain States. While many of these charges, after investigation, were not sustained, the committee nevertheless finds that there has been in several States, and in many forms, unjustifiable political activity in connection with the work of the Works Progress Administration in such States. The committee believes that funds appropriated by the Congress for the relief of those in need and distress have been in many instances diverted from these high purposes to political ends. The committee condemns this conduct and recommends to the Senate that legislation be prepared to make impossible, so far as legislation can do so, further offenses of this character.

II. The committee recommends legislation prohibiting contributions for any political purpose whatsoever by any person who is the beneficiary of Federal relief funds or who is engaged in the administration of relief laws of the Federal Government. The committee also recommends legislation prohibiting any person engaged in the administration of Federal relief laws from using his official authority or influence to coerce the political action of any person or body.

III. The committee recommends that section 19, title 1, of the present Work Relief Act, making it a misdemeanor for any person knowingly, by means of fraud, force, threat, intimidation, boycott, or discrimination on account of race, religion, political affiliations, or membership in a labor organization, to deprive any person of any of the benefits to which he may be entitled under the Work Relief Act, be so amended as to make such violation a felony instead of a misdemeanor.

IV. The committee recommends that all Federal relief acts should be so amended as to provide that any person who knowingly makes, furnishes, or discloses any list of persons receiving benefits under such acts or of persons engaged in the administration thereof, for delivery to a political candidate, committee, campaign manager, or employee thereof shall be deemed guilty of a misdemeanor.

V. The committee recommends that section 208, Title 18, of the United States Code be so amended as to prohibit not only the soliciting and receiving of political contributions by officials, employees, and persons now named in that section, but also by anyone acting in their behalf.

VI. The committee recommends that section 211, Title 18, of the United States Code be so amended as to prohibit political contributions not only by Federal employees to any Senator or Member of or Delegate or Resident Commissioner to Congress, but also to any candidate for such offices, or to any person or committee acting

with the knowledge and consent and especially in behalf of such Senator or Member of or Delegate to Congress or Resident Commissioner therein, or of any candidate for such office.

VII. The committee recommends that there should be a limitation upon contributions which individuals may make in behalf of a candidate seeking election to Federal office.

VIII. The committee recommends that section 209, Title 18, of the United States Code, relating to solicitation for political contributions in any room or building occupied in the performance of official duties by any person in the employ of the Federal Government be so amended as to include solicitation by letter and telephone, as well as in person.

IX. The committee recommends the adoption by the Senate of a rule requiring all candidates for the Senate to file with the Secretary of the Senate, in response to appropriate questionnaires, a full and complete statement of receipts and expenditures incurred by or in behalf of such candidates in their campaigns for nomination as well as for election.

X. The committee recommends that section 313 of the Federal Corrupt Practices Act be so amended as to prohibit any contribution by any national bank, any corporation organized by authority of any law of Congress, or by any corporation engaged in interstate or foreign commerce of the United States, in connection with any primary or general election.

XI. The committee recommends that subsection (c), section 309, of the Federal Corrupt Practices Act be so amended as to require candidates to report all their campaign expenditures, including those exempted in determining the amount they are allowed to spend under the law.

XII. The committee recommends that section 310 of the Federal Corrupt Practices Act be so amended as to prohibit candidates from promising work, employment, money, or other benefits in connection with public relief.

XIII. The committee recommends the enactment of a law regulating more strictly the use of the franking privilege.

XIV. The committee recommends that the Senate take under consideration the question whether or not a contribution for political purposes made either voluntarily or involuntarily by persons in the employ of the Federal Government should be permitted.

XV. The committee recommends that the Senate take under consideration the question of legislation in connection with coalition and group tickets.

XVI. The committee recommends that the Senate adopt a rule authorizing the Vice President to appoint, at the beginning of each Congress, for the duration of said Congress, a Senate committee on investigation of senatorial campaign expenditures, campaign activities, and use of governmental funds for the purpose of influencing primaries and general elections.

## APPENDIX B

Memo by Office of General Counsel U.S. Civil Service Commission.

PARTIAL LIST OF FEDERAL POSITIONS EXCEPTED FROM  
RESTRICTIONS ON POLITICAL MANAGEMENT AND CAMPAIGNING

The listing below reviews some of the position which qualify for the statutory exception.

- I. An employee paid from the appropriation for the Office of the President.
- 

This category includes employees of the White House Office only.

This category does not include:

- (a) competitive service employees who are detailed to the White House but not paid from funds specifically appropriated for the White House Office.
- (b) employees of the Bureau of the Budget, Office of Economic Opportunity, Office of Emergency Planning, and other agencies within the Executive Office of the President which do not come within the appropriation for the White House Office. However, presidential appointees in the Executive Office agencies who are confirmed by the Senate may be otherwise excepted.

- II. An employee appointed by the President, by and with the advice and consent of the Senate, who determines policies to be pursued by the United States in its relations with foreign powers.
-

Positions in this category include:

- (a) ambassadors and ministers appointed by the President with Senate approval.
- (b) (1) U.S. Representative to the United Nations
- (2) Deputy U.S. Representatives to the United Nations
  - to the Security Council
  - to the Economic and Social Council
- (3) U.S. Representative on the Trusteeship Council

Not excepted: Chairman, U.S. Section of United States-Mexican Border Development Commission (Senate confirmation not required.)

III. An employee appointed by the President by and with the advice and consent of the Senate who determines policies to be pursued by the United States in the nationwide administration of Federal laws.

- (a) "Bureau Chief" positions filled by Presidential appointment subject to Senate confirmation, such as:
  - (1) Treasurer of the United States
  - (2) Director of the Mint
  - (3) Chief of the Women's Bureau
  - (4) Director of the Childrens' Bureau
  - (5) Commissioner of Education
- (b) Heads and members of commissions or task forces created by statute or Executive order. Positions are excepted if the following conditions exist:



- (a) appointment by the President,
- (b) subject to confirmation by the Senate, and
- (c) responsibility for determining policies to be pursued by the United States in the nationwide administration of Federal laws.

- Members of Commissions and Task Forces created by statute would be excepted under the three conditions stated above, e.g., Commission on Civil Rights.

- Members of Presidential Commissions or Task Forces created by Executive order would not, in most instances, be excepted because the second condition, i.e., Senate approval, would not usually exist.

-Members of ad hoc part-time Commissions or Task Forces created by Presidential memorandum would not be excepted because their appointments would not be subject to Senate approval.

- Members of statutory Boards or Commissions with full-time appointments are excepted if the three conditions exist. Members of the SACB, Foreign Claims Settlement Commission, and Indian Claims Commission qualify for the exception.

NOTE: Any part-time member of a Commission, Board, or Task Force who does not qualify for any of the exceptions discussed herein is bound by the full restriction of

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the statute on days of active service only.

- (c) Solicitors and General Counsels who are appointed by the President subject to Senate approval are excepted, for example, Solicitor of Labor, General Counsel of the Department of Defense, and others.

IV. Schedule C Special Assistants to exempted Presidential appointees are not entitled to the general exception. It may be noted, however, that the Special Assistant to the Secretary of Health, Education, and Welfare comes within exception III above in view of the fact that he is appointed by the President subject to Senate confirmation and has policy making responsibilities in health and medical affairs.

V. The Head or Assistant Head of an Executive department or military department.

This category includes:

Hheads of departments

Undersecretaries

Deputy Heads including Deputy Postmaster General  
and Deputy Attorney General

Assistant Secretaries

Not excepted are:

Deputy Undersecretaries

Deputy Assistant Secretaries

Assistant Attorney General for Administration

## APPENDIX C

## Permissible Activities

## § 733.111 Permissible activities.

(a) All employees are free to engage in political activity to the widest extent consistent with the restrictions imposed by law and this subject. Each employee retains the right to-

- (1) Register and vote in any election;
- (2) Express his opinion as an individual privately and publicly on political subjects and candidates;
- (3) Display a political picture, sticker, badge, or button;
- (4) Participate in the nonpartisan activities of a civic, community, social, labor, or professional organization, or of a similar organization;
- (5) Be a member of a political party or other political organization and participate in its activities to the extent consistent with law;
- (6) Attend a political convention, rally, fund-raising function; or other political gathering;
- (7) Sign a political petition as an individual;
- (8) Make a financial contribution to a political party or organization;
- (9) Take an active part, as an independent candidate, or in support of an independent candidate, in a partisan election covered by § 733.124;
- (10) Take an active part, as a candidate or in support of a candidate, in a nonpartisan election;

(11) Be politically active in connection with a question which is not specifically identified with a political party, such as a constitutional amendment, referendum, approval of a municipal ordinance or any other question or issue of a similar character;

(12) Serve as an election judge or clerk, or in a similar position to perform nonpartisan duties as prescribed by State or local law; and

(13) Otherwise participate fully in public affairs, except as prohibited by law, in a manner which does not materially compromise his efficiency or integrity as an employee or the neutrality, efficiency, or integrity of his agency.

(b) Paragraph (a) of this section does not authorize an employee to engage in political activity in violation of law, while on duty, or while in a uniform that identifies him as an employee. The head of an agency may prohibit or limit the participation of an employee or class of employees of his agency in an activity permitted by paragraph (a) of this section, if participation in the activity would interfere with the efficient performance of official duties, or create a conflict or apparent conflict of interests.

#### Prohibited Activities

§ 733.121 Use of official authority; prohibition.

An employee may not use his official authority or influence for the purpose of interfering with or affecting the result of an election.

§ 733.122 Political management and political campaigning prohibitions.

(a) An employee may not take an active part in political management or in a political campaign, except as permitted by this subpart.

(b) Activities prohibited by paragraph (a) of this section include but are not limited to -

(1) Serving as an officer of a political party, a member of a National, State, or local committee of a political party, an officer or member of a committee of a partisan political club, or being a candidate for any of these positions;

(2) Organizing or reorganizing a political party organization or political club;

(3) Directly or indirectly soliciting, receiving, collecting, handling, disbursing, or accounting for assessments, contributions, or other funds for a partisan political purpose;

(4) Organizing, selling tickets to, promoting, or actively participating in a fund-raising activity of a partisan candidate, political party, or political club;

(5) Taking an active part in managing the political campaign of a partisan candidate for public office or political party office;

(6) Becoming a partisan candidate for, or campaigning for, an elective public office;

(7) Soliciting votes in support of or in opposition to a partisan candidate for public office or political party office;

(8) Acting as recorder, watcher, challenger, or similar officer at the polls on behalf of a political party or partisan candidate;

(9) Driving voters to the polls on behalf of a political party or partisan candidate;

(10) Endorsing or opposing a partisan candidate for public office or political party office in a political advertisement, a broadcast, campaign literature, or similar material;

(11) Serving as a delegate, alternate, or proxy to a political party convention;

(12) Addressing a convention, caucus, rally, or similar gathering of a political party in support of or in opposition to a partisan candidate for public office or political party office; and

(13) Initiating or circulating a partisan nominating petition.

SAM J. ERVIN, JR., N.C., CHAIRMAN  
 HOWARD H. BAKER, JR., TENN. VICE CHAIRMAN  
 HERMAN E. TALMADGE, GA. EDWARD J. GURNEY, FLA.  
 DANIEL K. INOUE, HAWAII LOWELL P. WEICKER, JR., CONN.  
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 DEPUTY COUNSEL

## United States Senate

SELECT COMMITTEE ON  
 PRESIDENTIAL CAMPAIGN ACTIVITIES  
 (PURSUANT TO S. RES. 40, 810 CONGRESS)  
 WASHINGTON, D.C. 20510

### MEMORANDUM OF LAW

### LEGISLATION CONCERNING CAMPAIGN CONTRIBUTIONS AND FINANCING OF FEDERAL ELECTIONS

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This is the first of a series of memoranda prepared by the staff of the Select Committee in preparation for the Committee's investigation of campaign financing practices.<sup>\*/</sup> In this memorandum, we broadly review the existing federal statutes governing political contributions and spending limitations in connection with elections for federal office. Our discussion is divided into three parts. The first part covers the various restrictions on the making of political contributions and the requirements, where such contributions may validly be made, that they be disclosed. Here, we discuss also the restrictions on credit furnished by regulated industries. The second part is concerned with limitations on the amounts that may be expended by the candidates themselves. In the final section, we deal with certain tax aspects of campaign financing, particularly the special income and gift tax consequences of gifts to political committees.

## I. Restrictions and Disclosure Requirements

### A. Corporation and Union Contributions

The first congressional action in the area of campaign financing was the Act of January 26, 1907, which prohibited direct contributions by corporations in elections for the Presidency, Senate, and House. This legislation, in slightly revised form, became the Federal Corrupt Practices Act of 1910, 36 Stat. 822 (1910). In 1921, the Supreme Court in the case of Newberry v. United States, 256 U.S. 232 (1921), held that the Act was unconstitutional as applied to senatorial primaries held prior to the

<sup>\*/</sup> Other memoranda will cover such areas as contributions by foreign sources and the relevance of the Hatch Act to federal campaign financing.



enactment of the constitutional amendment (Seventeenth Amendment) which provided for the direct election of Senators. This caused the Congress to pass the Corrupt Practices Act of 1925 which defined the term "election" to exclude primaries and political conventions. In addition, the law defined "contribution" in the broad sense as including gifts of money or anything of value and subjected the recipients as well as donors of such gifts to penalties.

During World War II, Congress extended the prohibition against corporate contributions to labor unions. Such a provision was included in Section 204 of the Labor Management Relations Act of 1947 (the Taft-Hartley Act) and the Corrupt Practices Act was concomitantly revised to include labor unions as well as corporations, to include "expenditures" as well as contributions and primary elections as well as general elections. 18 U.S.C. § 610 (1947).<sup>\*/</sup>

As it read in 1971, the relevant section of the Corrupt Practices Act thus provided that:

It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution

\*/ It seems clear that Congress constitutionally may regulate presidential or congressional primaries as well as nominating conventions for national office. See Chambers & Rotunda, Reform of Presidential Nominating Convention, 56 Va. L. Rev. 179 (1970).

or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section."

every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than \$5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, and any person who accepts or receives any contribution, in violation of this section, shall be fined not more than \$1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than \$10,000 or imprisoned not more than two years, or both.

Until 1971, the term "contribution" was defined as:

a gift, subscription, loan, advance, or deposit, of money, or anything of value, and ... a contract, promise or agreement to make a contribution, whether or not legally enforceable. 18 U.S.C. § 591.

In 1971, Congress passed the Federal Election Campaign Act, 18 U.S.C. § 591, which amended the Corrupt Practices Act set out above. The Act by its terms did not take effect until April 7, 1972. What it did essentially was to clarify the definition of an illegal "contribution." First, Congress codified the principle recognized by a federal court decision that a national or state bank could make a loan "in accordance with the applicable banking laws and regulations and in the ordinary course of business," a principle that had been recognized by the federal courts.<sup>\*</sup> More significant,

<sup>\*</sup>/ U.S. v. First National Bank of Cincinnati, 329 F. Supp. 1251, (S.D. Ohio 1971).

however, was the additional language specifying permissible and illegal "contributions or expenditures" by corporations and labor unions, language which is set out in full below.<sup>\*/</sup>

The 1971 Act makes it clear that certain political activities are expressly permissible. The law exempts communications between a corporation and its stockholders and their families (but not between a corporation and its employees). Similarly excluded from

\*/ The provision reads in full:

As used in this section, the phrase 'contribution or expenditure' shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section; but shall not include communications by a corporation to its stockholders and their families or by a labor organization to its members and their families on any subject; nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and their families, or by a labor organization aimed at its members and their families; the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization: Provided, That it shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction.

the law are communications by unions to members and their families "on any subject." In both instances, Congress has gone on to allow nonpartisan registration and "get-out-the-vote campaigns."<sup>\*/</sup>

Finally, the 1971 Act permits a corporation or labor union to provide for "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes." The corporation or union need insure only that the money was not obtained through force or the threat of employment reprisals, or "in any commercial transaction."<sup>\*\*/</sup> The provision in the new act for a separate fund basically codifies the decision of the Supreme Court in Pipefitters Local 562 v. United States, 407 U.S. 385 (1972). There, the Court sanctioned the common practice of separate funds for political purposes set up by labor unions governed by the older Corrupt Practices Act, so long as the persons contributing to the fund were fully aware

<sup>\*/</sup> Although the statutory language talks only of nonpartisan activities aimed at stockholders and union members and their families, the Justice Department has interpreted the law to exempt nonpartisan activities aimed at the general public. Letter and staff Memorandum from Henry E. Petersen, Assistant Attorney General to Rep. James Harvey, Aug. 23, 1972, reprinted in H.R. Rep. No. 93-1, 93rd Cong., 1st Sess. 273-74 (1973). The Justice Department position is consistent with case law prior to the passage of the Federal Election Campaign Act. United States v. Lewis Food Co., 366 F.2d 710 (9th Cir. 1966).

<sup>\*\*/</sup> The penalty for violation of the provisions governing corporation and union contributions, is a maximum fine of \$5,000 for the corporation or labor organization involved. An officer or director of a corporation or union who consents to an illegal contribution and any person who receives one are equally subject to a fine of \$1,000 or a one-year prison sentence or both. If the violation is wilful, the maximum penalty is a fine of \$10,000 and a two year sentence.

that their contributions were voluntary. <sup>\*/</sup>

It is in this area of voluntary funding that the new Campaign Act may be most unclear and possibly subject to abuse. The Act specifies that the use or threat of physical force, job discrimination or financial reprisals will render a contribution involuntary, and the Supreme Court has said, as we have noted, that under the previous legislation contributors had to be aware that their donations were strictly voluntary. However, the thrust of the Act is to allow the corporation or labor union to solicit contributions from their employees to fulfill whatever purposes may be served by a political fund. Here the line between what is permissible solicitation and what is coercion becomes clouded. An executive might be asked to supervise solicitation of a certain group of stockholders, employees, or union members, for example. Arguably, it would be permissible for this person to administer such a program on his own time, but since executives are not called upon to punch time clocks, it is very difficult to say what portion of his efforts relate to his employer's time, and thus possibly to non-voluntary action, and what he has done on his own time. In addition, the executive might be asked to invest more than time; he might be asked

<sup>\*/</sup> Dicta in the Pipefitters case suggests that prior to 1972, labor unions could not have used general union funds to administer a political fund; the Court added, however, that the new law "plainly permits it." 407 U.S. at 427.

to sign a letter inviting contributions from various sources. This would be a contribution of the employees' name to a political campaign and may well be viewed by his employer as voluntary activity. But in reality it may be assumed that any high officer, when asked by his superior to undertake such a project, would naturally feel some pressure, real or imagined, to comply with his employer's request. Each case will then have to be viewed by the courts on a case-by-case basis, and absent any guidelines yet drawn by the courts, it is unclear just how this provision will be viewed and applied.

An additional source of abuse may be in the area of partisan solicitation among corporation employees (apparently this took place on a widespread basis during the 1972 presidential campaign). The law provides that a corporation may communicate anything to its stockholders, including partisan appeals for campaign contributions. It may also establish a segregated fund to which the general public presumably can contribute. If the corporation establishes a partisan fund, however, and solicits donations for it from persons other than its stockholders, it is, under a strict interpretation of the law, arguably making an illegal contribution, in the form of solicitation and administration costs, to a particular candidate or party. Following this interpretation, in order to solicit from its employees or the general public, a corporation must establish a nonpartisan campaign fund -- one which clearly is within the control of the corporation officers. There would be no indication that the funds are intended for a particular candidate

or party, although contributors might draw their own conclusions about what kind or even what specific candidates a particular corporation is likely to support. The problem here is that the statute is not clear enough on its face, and no judicial decisions have yet addressed themselves to this set of circumstances.

Before turning to the disclosure aspects of federal campaign law, we should briefly discuss one other restriction on political contributions -- 18 U.S.C. § 611 which prohibits contributions by federal contractors. Prior to 1972, there was confusion as to how this prohibition applied to corporate contractors. The 1940 amendments to the Hatch Act, of which the original section 611 was a part, were designed, as shown by the legislative history, to prohibit contributions by "persons, corporations or firms" engaged in government contracting. During the floor debates, however, the word "corporations" was deleted, on the theory that any corporate contributions were already prohibited by the Corrupt Practices Act. Although the word "whoever" (defined in another section of the Act to include corporations) was substituted for the term "persons or firms" in 1948, the original wording remained in the section title, and in 1961 the Justice Department was still interpreting the section as inapplicable to otherwise permissible corporate contributions.<sup>\*/</sup> The 1971 law, however, specifically covers donations by corporate contractors, and thus arguably prohibits donations from segregated

<sup>\*/</sup> Letter from Burke Marshall, Assistant Attorney General, to Senator Williams, April 20, 1961, in Cong. Rec. daily ed., Jan. 10, 1964.

political funds otherwise permitted under § 610. <sup>\*/</sup>

#### B. Disclosure Requirements

Both the Corrupt Practices Act and the Federal Elections Campaign Act have required public disclosure of campaign donations. A gaping loophole in the law prior to April 7, 1972, however, was the provision that a political committee which operated in only one state and was not a branch of a national party was not required to report contributions. <sup>\*\*/</sup> The new law requires that all committees handling more than \$1,000 per year report contributions in excess of \$100. It also replaces the requirement under the old Act that individuals making expenditures in excess of \$50 in more than one state must report such contributions, with a stronger provision applying to all individuals making large contributions or expenditures other than through contributions to a candidate or committee.

Another problem was the vagueness of the Corrupt Practices Act with regard to when, in a given campaign, the disclosure requirements took effect. The law specifically exempted disclosure of primary election financing and the requirements were frequently interpreted to become operative only upon the nomination of a candidate by a political party. <sup>\*\*\*/</sup> The new law clearly requires

<sup>\*/</sup> The maximum penalties for violation of section 611 are five years imprisonment or a \$5,000 fine, or both.

<sup>\*\*/</sup> 2 U.S.C. § 241 (c)

<sup>\*\*\*/</sup> This interpretation has been challenged, however, on the grounds that much "pre-convention financing", particularly in campaigns involving incumbents, is aimed at the general election. Common Cause v. Finance Committee to Re-elect the President (D.C. D.C.), Civ. Action No. 1780-72.



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disclosure as soon as a candidate or committee handles its first financial transaction.

In general, Title III of the Act requires disclosure by candidates and political committees of all contributions, transfers, and expenditures in excess of \$100. Persons making contributions or expenditures in excess of this sum other than by contribution to a "committee" or "candidate" as defined by the Act are required to personally report such contributions. The new law in contrast to the old Corrupt Practices Act, also prohibits contributions in the name of another or the knowing acceptance of such contributions.

"Candidate" is defined by the Act as anyone who has (1) filed for federal office or (2) accepted a contribution, made an expenditure or authorized same with a view to bringing about his nomination or election to federal office. A "political committee" in turn is any group handling more than \$1,000 in contributions or expenditures in a calendar year. Thus a contributor who gives more than \$100 to a "minor" committee is required to make an independent report of his contribution. The definition of political committee does not include individuals, as every committee must have a chairman and a treasurer who must be separate persons, and no contributions or expenditures can be handled by a committee when there is a vacancy in either office. Finally, "contributions" includes gifts or loans of anything of value, including the services of an employee, but excludes the services of a bona fide volunteer. <sup>\*/</sup>

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<sup>\*/</sup> The entire text of the 1971 Act is appended as Appendix A to this memorandum. Title III is set out at pages 5-9 of Appendix A.

Under the provisions of the 1971 Act, reports are made to the appropriate supervisory officer: the Comptroller General in the case of executive candidates, or the Secretary of the Senate or Clerk of the House of Representatives. Each of these officers has since drawn up appropriate regulations for the process. Political committees must register with the appropriate officer as soon as they anticipate handling contributions or expenditures of \$1,000 in a year. Reports are made by the candidate or committee on the tenth day of March, June, and September. In addition to reporting contributions and expenditures in excess of \$100, a committee treasurer is required to keep records of contributions in excess of \$10 and all expenditures.

The new law, in another departure from the Corrupt Practices Act, is clear concerning solicitations or expenditures by an unauthorized committee on behalf of a candidate: All of the committee's advertisements must include on their face a notice that the committee is not authorized by the candidate and he is not responsible for its activities. There is no such disclaimer requirement, however, applicable to the unauthorized activities of an individual acting on behalf of a candidate or committee. But such persons cannot escape the basic disclosure requirement. For if they accept any contribution in excess of \$10 in the name of a committee, the Act mandates that they report this fact to the committee treasurer within five days and the report becomes a part of the committee's required records and reports which are submitted to the supervisory

officer. Moreover, if the individual makes expenditures on behalf of either a committee or candidate he must himself file a report with the supervisory officer. If he accepts contributions and then forwards them to a candidate he cannot do so in his own name under the new law since to do so would be considered a conspiracy to make contributions in the name of another.

A special problem is presented by the section of the Federal Election Campaign Act governing corporate and union contributions (18 U.S.C. § 610) read in conjunction with the disclosure requirements of the Federal Election Campaign Act: Does a corporation or union in setting up a segregated fund as permitted under § 610 constitute a political committee subject to disclosure requirements? It has been argued that if a corporation, for example, solicits and forwards checks from its stockholders made out to a candidate or committee, it acts only as a conduit for contributions, and should not itself be subject to reporting requirements. Under this rationale, the eventual recipient of the fund would record and report the individual donations channeled through the corporate mechanism. There would be no report, however, that these contributions were actually the result of a stockholder solicitation drive, possibly massive, financed with corporation funds. This may, in fact, be legal. It is certainly not consistent, however, with the spirit of the disclosure law.

If the corporation or labor union does not act merely as a conduit for funds designated by individual contributors for specific

candidates or committees, but assumes control over the funds it solicits, then it clearly becomes a political committee (or the officers or employees who control the funds become a committee), and it is subject to reporting requirements.

Commentators disagree as to what, if any, loopholes remain in the new reporting provisions. Some argue that disclosure can be avoided by earmarking contributions made to a multicandidate committee (such as the Democratic and Republican Congressional Campaign Committees) to be used for a particular candidate. It has been reported that the National Committee for a Democratic Congress, for example, handled over \$415,000 in earmarked funds in 1972.<sup>\*/</sup> Strictly construed, however, the law requires full disclosure, since earmarking funds would seem to constitute the equivalent of making a contribution in the name of another. And again, it is difficult to predict, absent judicial or regulatory guidelines, the precise manner in which the relatively new legislation will be construed by the federal courts.

#### C. The Extension of Unsecured Credit

A special form of campaign "contribution" is the furnishing of unsecured credit for the candidate's transportation, communications, and the like. The problem of such credit first became a public issue during the presidential campaign of 1968, when published reports indicated that the Democratic candidate, Senator Humphrey, had ended his campaign with rather sizable debts to certain airlines

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<sup>\*/</sup> Washington Post, December 1, 1972 at A 17, col. 2.

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and communications media. This issue was then considered by Congress in the debates on the Federal Election Campaign Act of 1971.

Section 401 of the Federal Election Campaign Act required three regulatory agencies, the Civil Aeronautics Board, the Federal Communications Commission and the Interstate Commerce Commission, to promulgate regulations with respect to unsecured credit given by any person regulated by the agency to a candidate for federal office. Each agency has now promulgated its regulations, and they differ somewhat. We have attached copies of the Regulations as Appendix B, and briefly review them here.

The Federal Communications Commission has placed no flat prohibition on the extension of unsecured credit. Instead, it has required only that if a carrier extends such credit to one candidate or his representative, it must be extended to all candidates "on substantially equal terms and conditions to all candidates... for the same office, with due regard for differences in the estimated quantity of service." In addition, the FCC requires that the carrier give notice of intent to discontinue service within 7 days if bills are not paid within 15 days and that carriers with annual operating revenues in excess of \$1,000,000 make semi-annual reports listing any amounts due and unpaid. 47 C.F.R. § 64.801.

The Interstate Commerce Commission has expressly forbidden the granting of unsecured credit. The ICC regulations simply state that all agreements extending credit to federal candidates by persons subject to the Commission's regulations must be in writing

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and contain a detailed description of "the deposit, bond, collateral or other means of security, used to secure payment of the debt."

49 C.F.R. §§ 1325.1 and 1325.2.

The Civil Aeronautics Board has adopted regulations which allow carriers to authorize unsecured credit but restricts the use of such credit in certain circumstances and calls for reports by both the carrier and the candidates. 14 C.F.R., § 374 a. At least once a month the carrier must send to the candidate a statement of current unsecured credit. The carrier also may not extend further credit for transportation or other purposes so long as there remains any "overdue indebtedness", as defined below. No credit may be advanced for transportation to a candidate in an election campaign subsequent to the effective date of the regulation without a written statement from the candidate seeking such credit. Finally, similar to the FCC regulation, the CAB requires that the carrier give notice of past indebtedness within 7 days after the debt becomes overdue, and if the debt is not paid within 14 days after the notice, no further unsecured credit may be extended by a regulated air carrier.

## II. Statutory Limitations on Campaign Spending

The present limitations on the amounts that may be expended by candidates seeking federal office are set forth in the Federal Election Campaign Act, which we have already discussed in Part I. To review what we have said above, the Act applies not only to general and special elections but also to all primaries, nominating

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conventions, and caucuses. <sup>\*/</sup> All federal offices are included within its coverage and the Act defines a "political committee" as any individual or entity which accepts contributions or makes expenditures during a calendar year in an aggregate amount exceeding \$1,000.

Section 104 of the 1971 Act lists certain limitations with respect to political broadcasting. Prior to the Act, the only limitation in this area was the so-called "equal time" provision of the Communications Act of 1934, which basically required a broadcaster offering free time to a candidate for federal office to offer each of that candidate's opponents an equal amount of free time. The Act, by contrast, sets specific limitations on spending.

The Act provides that any legally qualified candidate for federal office <sup>\*\*/</sup> may not spend or have spent on their behalf <sup>\*\*\*/</sup> for "communications media" in his election campaign a sum in dollars equal to 10 percent of the resident voting age population in the

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<sup>\*/</sup> The Act also explicitly covers the election of delegates to a constitutional convention. This extension of the Act would appear to be free of constitutional defect. See note <sup>\*/</sup> at page 2, supra.

<sup>\*\*/</sup> The Act defines "legally qualified candidate" as "any person who (A) meets the qualifications prescribed by the applicable laws to hold the Federal elective office . . . , and (B) is eligible under applicable state law to be voted for by the electorate directly or by means of delegates or electors." § 102 (4).

<sup>\*\*\*/</sup> The provision which, in effect, limits the right of citizens to use the media in support of candidates of their choice is arguably violative of the citizens' First Amendment rights and may be challenged on this basis in the courts.

state or district in which he or she seeks office, or the sum of \$50,000, whichever is greater. "Communications media" under the Act includes all forms of broadcasting (i.e., radio and television) and newspapers, magazines, outdoor advertising facilities and telephones used by a candidate. The Act further requires that no more than 60 percent of the applicable sum be used for the use of broadcast stations. With regard to all nonpresidential primaries, including runoffs, the candidates are subject to the same statutory limitations as are in force with respect to federal elections. Candidates for the presidential nomination are in turn restricted to spending in each primary the total sums allowable to a candidate for Senator from the state in which the primary is being held. For purposes of the Act, a person is considered to be a presidential candidate during the period:

(i) beginning on the date on which he (or such other person) first makes such an expenditure (or, if later, January 1 of the year in which the election for the office of President is held), and

(ii) ending on the date on which such political party nominates a candidate for the office of President.

Finally, the Act establishes a maximum rate for broadcasting charges for a period of 45 days preceding a primary and 60 days preceding a general or special election, and precludes the candidates from being charged more than a comparable use charge for nonbroadcasting communications and for broadcasting time prior to the commencement of the 45 or 60-day periods. <sup>\*/</sup>

<sup>\*/</sup> Section 104 of the Act also contains an escalation clause pegged to the consumer price index for increasing the spending limitations.



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Prior to the effective date of the 1971 Act, federal legislation prevented individuals (but not political committees) from making contributions for any candidate for federal office in an aggregate amount each year in excess of \$5,000. 18 U.S.C. § 608. In addition, political committees<sup>\*</sup> could not receive total annual contributions in excess of \$3,000,000 or make expenditures in excess of that sum for any one year. 18 U.S.C. § 609. And an individual candidate was allowed to personally spend no more than \$25,000 for a senatorial campaign or \$5,000 for a campaign for the House, plus personal, traveling, printing, postage, and other related expenses. 2 U.S.C. § 248.

The 1971 Act removed the \$5,000 and \$3,000,000 limitations, replacing them with the disclosure requirements discussed earlier in this memorandum. Furthermore, the Act placed a \$50,000 limitation on expenditures from personal funds for the office of President and Vice-President, increased the limitations on personal spending with respect to senatorial and congressional campaigns to \$35,000 and \$25,000, respectively, and applied this limitation to cover the candidate's immediate family as well as funds from his own person. The new Act also deletes the exception for those items such as travel and stationery that were specifically excluded from the maximum allowable sum under the pre-1971 legislation.

<sup>\*</sup>/ The definition of "political committee" here, too, was restricted to a committee operating in two or more states or as a branch of a national committee.

### III. Tax Consequences of Gifts to Political Committees

#### A. Gifts of Appreciated Property and the Status of Political Committees

During the 1972 campaign the appropriate tax treatment of capital gains from the sale of appreciated property by political parties and committees emerged as a controversial issue and indirectly brought into the open the overall question of the tax status of political committees. The capital gains issue arose because both political parties were receiving contributions in the form of property, usually securities, with a relatively low tax basis but high current market value.<sup>\*/</sup> The campaign organization ordinarily would sell these securities at the current market value and use the proceeds to finance the campaign. This arrangement permitted the contributor to obtain "political credit" for the full market value of the stock even though the original cost was relatively small. Alternatively, the donor would transfer the securities from a personal brokerage account to the brokerage account of the political organization. The organization would then sell the stock, and return to the donor the amount of his original investment. In this situation the contributor was able to avoid capital gains tax on the profit, for the Internal Revenue Service would allow both the donor and the political organization to avoid the capital gains tax when contributed stock was sold. The donor

<sup>\*/</sup> Recent estimates suggest that the Finance Committee to Re-elect the President received approximately \$8,850,000 and the McGovern organization received approximately \$1,440,800 in securities.

was not taxed on the appreciation because his donation was considered a "gift" for income tax purposes. Since there were no regulations or rulings specifically covering this situation, it is unclear why such gains were not taxed to the committee.

This anomolous tax treatment of contributed property was presented to the American public in a September 27, 1972, article appearing in the Wall Street Journal. Shortly thereafter, on October 3, 1972, IRS issued a News Release (IR-1257) which announced that "in view of the recent and common practice of transactions involving appreciated property for political purposes, the Internal Revenue Service must now consider what tax results arise where such property is sold." The Service then solicited briefs and comments on the subject and announced that public hearings would be held in connection with the issues involved. On August 1, 1973, after receiving twenty-eight submissions in response to the invitation and holding public hearings, IRS issued a Policy Statement in which it proposed a new course of action. The statement constituting the current IRS position made basically four points:

- 1) It had been the long-standing practice of the Service not to require political parties or committees to file tax returns, but that, the Revenue Service would now, since there was no Code provision on the subject, require such entities to file returns;
- 2) That unincorporated political parties or committees may be treated for tax purposes as associations taxable as corporations or as trusts (or possibly partnerships) depending upon

standards to be developed;

3) That the gross income of political parties or committees shall include interest and dividends from investments; income from any ancillary activities and gains from sales of appreciated property by the committees or parties; and

4) that gains on the sale of appreciated property, net of any losses, should be included in income of political parties or committees to the extent provided in the Internal Revenue Code.

The Statement went on to note that the Internal Revenue Service would not seek to enforce the legal conclusions announced in the Policy Statement "until it appears that Congress has had an opportunity to consider the problem specifically." In any event, the rules and requirements were not to apply to sales of appreciated property prior to the date of the IRS statement of concern with the problem on October 3, 1972. And, finally, the Service announced that it would not require political parties and committees to file tax returns for years prior to 1972.

Turning to the legal considerations, the Service, as we noted above, has for a number of years taken the position that transfers to political organizations are gifts for gift tax purposes. The Internal Revenue Code provides that the gift tax will apply to the extent that the transfer is not made "for an adequate and full consideration in money or money's worth." For income tax purposes, however, a transfer will be treated as a gift if it is given with "detached and disinterested generosity" and is motivated by "affection, respect, admiration, charity or like impulses." Since gift

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tax law and income tax law are not in pari materia, it might be argued that a political contribution is subject to gift tax as well as income tax. Assuming here that the current IRS position that a political contribution is a gift for income tax purposes is correct, it follows that the donee political committee takes the donor's basis in the contributed property and would thus ordinarily realize gross income upon the sale of the appreciated property.

The threshold question with respect to taxability of the income is whether a political party or committee is a taxable entity. Political parties are not specifically exempted from taxation under the Internal Revenue Code. During the course of a 1965 case,<sup>\*/</sup> the Government alleged that "all political parties... are taxable associations" under the Code. Furthermore, Rev. Proc. 68-19 states that "[i]f an unexpended balance of political funds is set aside in a separate bank account, the political candidate, committee, or organization holding such funds may report any income credited to the account on a U.S. Fiduciary Income Tax Return... and pay any tax shown by such return to be payable." From this language a strong implication may be drawn that a political party or committee is a taxable entity. Unfortunately, the Service cast doubt on this proposition in the August 1 statement. It noted that historically IRS has never required political parties to file tax returns. It also emphasized that Rev. Proc. 68-19 was directed principally at funds maintained for individual candidates and did not provide

<sup>\*/</sup> Communist Party of the U.S.A. v. Commissioner, 373 F.2d 682, 684 (D.C. Cir. 1967).

definitive guidelines for political parties or committees. And it further set forth the proposition that there are no definitive guidelines which show whether, and to what extent, deductions are allowable against income reported by a political party or committee. Apparently, the current IRS position is that the administrative "history" of not requiring political parties to file returns is a stumbling block to taxation of capital gains from the sale of appreciated property.

In conclusion, there is some controversy as to the past and present approach of the Internal Revenue Service toward taxation of gain resulting from the sale of appreciated property given to political committees. The view that the donor should be taxed on the gain<sup>\*/</sup> is supported by the fact that ordinary money contributions are made in after-tax dollars. Another view is that the political committee itself should pay tax on the gain. Here, there are diverse opinions as to the best legal theory to support taxation of political committees. It is not clear, for example, whether a political committee should be taxed as a corporation, a trust or an

<sup>\*/</sup> This view is suggested by Rev. Rul. 60-370, 1960-2 Cum. Bull. 203 and the district court ruling in Rollins v. United States, 302 F.Supp. 812 (W.D. Tex. 1969). Contra, Jacobs v. United States, 280 F.Supp. 327 (S.D. Ohio 1966); Sheppard v. United States, 361 F.2d 972 (Ct. of Claims 1966).

One problem is that it is inconsistent with the general principle that gain on gifts is taxed to the donee rather than the donor. Perhaps, however, this problem could be resolved by providing that campaign contributions could only be made in the form of money, and thus necessarily would represent a taxable gain (or loss) to the contributor who had sold his property in order to contribute the proceeds.

association. What is clear is that none of the existing legal theories of taxation can readily be applied to political committees without modification. Furthermore, absent statutory clarification, it is possible that an attempt to tax political committees via exemptions to or modifications of existing legal theories could create a spill-over in which the exemptions engulf the rule. In this area, then, there would appear to be four possible issues for congressional resolution. These are: 1) Whether a political contribution is a gift for gift tax purposes, 2) Whether tax on capital gains from the sale of appreciated property should be paid by the recipient political organization or by the donor, 3) Whether a political party or committee is a taxable entity and, if so, whether it should be taxed as a corporation, a trust, an association or another organizational entity, and 4) Whether, and to what extent, expenditures by a political organization are deductible from income.

#### B. The Gift Tax Exclusion

The gift tax was enacted to prevent evasion of the estate tax by means of inter vivos transfers. Although the tax originated as a backdrop for the estate tax, it has long been the IRS position that transfers to political organizations are gifts subject to the gift tax.

Generally, the Internal Revenue Code provides for a gift tax exclusion in the amount of \$3,000 per donee. In addition, each taxpayer is entitled to a \$30,000 lifetime exclusion over and above

the \$3,000 annual exclusion. The Supreme Court in Helvering v. Hutchings, 312 U.S. 393 (1940), held that the taxpayer was entitled to one exclusion for each beneficiary of a trust to which he had made a gift. The Court observed that a literal approach to the exclusion would lead to use of multiple trusts as conduits established to avoid the gift tax. To avert this possibility, the Internal Revenue Code subsequently was amended to disallow such an exemption in the case of "every gift in trust." Therefore, multiple trusts cannot be used to avoid the gift tax on gifts to private individuals. In Heringer v. Commissioner, 235 F.2d 149 (9th Cir. 1956), cert. denied, 352 U.S. 927 (1956), the Hutchings rule was extended to apply to corporations as well as trusts.

Armed with the Hutchings and Heringer cases as precedent, the Service in 1972 was faced with the question whether each political committee supporting a candidate for office should be entitled to a separate \$3,000 exclusion. This approach, if adopted, might appear inconsistent with the rule that it is the beneficiary of a gift that is significant. Historically, IRS had allowed a political contributor to avoid the gift tax by dividing a large gift into \$3,000 fragments to be disbursed to any number of "dummy" committees, each one entitled to the \$3,000 annual exclusion. However, with the proliferation of such committees just prior to the 1972 elections, IRS issued Rev. Rul. 72-355 on July 17, 1972.

Revenue Ruling 72-355 basically did not establish effective guidelines to prevent the use of multiple committees to avoid the



gift tax. Rather, the Ruling simply provided for the aggregation of dummy committees for purposes of the exclusion in the following manner:

In general, political organizations will be recognized as separate donees for purposes of the annual gift tax exclusion. Where, however, political organizations have essentially the same officers and supported candidates and no substantial independent purpose, the organizations will be treated as one and gifts to them by an individual will be aggregated for purposes of section 2503 (b) of the Code. For purposes of this paragraph, the officers or supported candidates will not be deemed to be essentially the same if at least one third of the officers or candidates are different in each of the committees.

Political organizations can easily avoid this Ruling by establishing committees which have at least one-third of their officers or candidates distinct from the makeup of all other committees. In fairness to the Service's position, the problem of formulating standards for distinguishing between a dummy committee and a valid one is evident. For example, should a committee be considered valid simply because it has full-time employees, rented office space, or a certain number of contributors? But while there may be difficulty in employing any rigid standards in this area, the problem merits further consideration aimed at eliminating the present tax avoidance devices.

Perhaps the question of multiple exclusions could be resolved by a re-evaluation of the gift tax itself. In the absence of a Code provision supporting the current IRS position, the better view may be that the gift tax should not apply to political contributions at all. This approach is supported by the rationale in Stern v.

United States, 436 F.2d 1327 (5th Cir. 1971), a lower court ruling affirmed by the U.S. Court of Appeals for the Fifth Circuit. Edith Stern was a taxpayer who was affiliated with a group of individuals who sought to promote a slate of candidates dedicated to protecting the interests of the group. The group collected contributions from its members and made campaign expenditures for handbills, posters, sample ballots, and newspaper and television advertising. The expenditures of the group were held to be full and adequate consideration for the contributions. Although not made in the ordinary course of business by the group, the contributions were not taxable gifts to the extent they were "bona fide, at arm's length, and free from donative intent." IRS did not appeal the case beyond the Court of Appeals, but the Service has limited application of the rule to the Fifth Circuit. The significance of the Stern case lies in the realization that most political contributors, like Mrs. Stern, are making bona fide, arm's length contributions free of the donative intent which accompanies gifts made outside the political area.

Finally, it seems fair to conclude that in addition to eliminating the need for multiple committees to avoid the gift tax, Congressional action in removing the gift tax from political contributions would have the salutary effect of simplifying administration of the reporting and disclosure laws. In this context, it

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should be kept in mind that the gift tax is a relatively insignificant source of revenue for the federal government.

Samuel Dash  
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W. Dennis Summers  
Assistant Counsel

Martha Talley  
Bruce Quan  
Research Assistants

December, 1973



### III. Presidential Subpoenas



UNITED STATES OF AMERICA  
CONGRESS OF THE UNITED STATES  
SUBPOENA DUCES TECUM

To: President Richard M. Nixon, The White House, Washington, D. C.

Pursuant to lawful authority, YOU ARE HEREBY COMMANDED to make available to the SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES of the Senate of the United States, on Thursday, July 26, 1973, at 10:00 o'clock a.m., at their committee room, 318, Old Senate Office Building, the following:

Any and all records, or copies of records including but not limited to, documents, logs, records, memoranda, correspondence, news summaries, datebooks, notebooks, photographs, recordings or other materials relating directly or indirectly to the attached list of individuals and to their activities, participation, responsibilities or involvement in any alleged criminal acts related to the Presidential election of 1972 which the Committee is authorized to investigate pursuant to Senate Resolution 60 including but not limited to, the break-ins of the Democratic National Committee offices on or about May 27, 1972 and on or about June 17, 1972, the surveillance, electronic or otherwise of said offices, and efforts made to conceal information or to grant executive clemency, pardons or immunity and payments made to the defendants and/or their attorneys relating to the above stated matters.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

TO Rufus L. Edmisten, TRAY F. LINDEN  
to serve and return.

Given under my hand, by order of the  
committee, this 23rd day of July, in  
the year of our Lord one thousand nine  
hundred and seventy-three

Sam J. Erwin Jr.  
Chairman, Senate Select Committee on  
Presidential Campaign Activities.



Mitchell, John

Moore, Richard A.

Shumway, DeVan

Strachan, Gordon

Timmons, William

Young, David

Ziegler, Ron

Buchanan, Patrick J.

Butterfield, Alexander P.

Campbell, John

Caulfield, Jack

Chapin, Dwight

Colson, Charles

Dean, John

Ehrlichman, John

Fielding, Fred

Haldeman, H. Robert

Higby, Larry

Howard, Richard

Hunt, E. Howard

Kehrli, Bruce

Krogh, Egil

LaRue, Frederick

Liddy, G. Gordon

Magruder, Jeb Stuart

Served on: President, received on  
Time: 6:35 behalf of the President

Date: July 23 1973

Place: White House Executive Office Building  
White House

Rufus L. Edmonson

Jerry F. Long  
7/23/73

Received on behalf of the President  
By: Leonard Garment  
Counsel to the President

UNITED STATES OF AMERICA  
CONGRESS OF THE UNITED STATES  
SUBPOENA DUCES TECUM

To: President Richard M. Nixon, The White House, Washington, D. C.

Pursuant to lawful authority, YOU ARE HEREBY COMMANDED to make available to the SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES of the Senate of the United States, on Thursday, July 26, 1973, at 10:00 o'clock a.m., at their committee room, 318, Old Senate Office Building, the following:

Any and all original electronic tapes and recorded telephone messages of the below listed conversations or oral communications, telephonic or personal, between President Nixon and John Wesley Dean III, discussing alleged criminal acts occurring in connection with the Presidential election of 1972 which the Committee is authorized to investigate pursuant to Senate Resolution 60 including but not limited to the break-ins at the Democratic National Committee offices on or about May 27, 1972, and on or about June 17, 1972, and any efforts made to conceal information or to grant executive clemency, pardons or immunity and payments made to the defendants and/or their attorneys relating to the above incidents at the dates and times of the attached list of conversations:

September 15, 1972 (personal) 5:27 p.m. to 6:17 p.m.  
 February 28, 1973 (personal) 9:12 a.m. to 10:23 a.m.  
 March 13, 1973 (personal) 12:42 p.m. to 2:00 p.m.  
 March 21, 1973 (personal) 10:12 a.m. to 11:55 a.m.  
 and 5:20 p.m. to 6:01 p.m.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

To Rufus L. Edmisten, HARRY F. LEAH  
 to serve and return.

Given under my hand, by order of the  
 committee, this 23rd day of July, in the  
 year of our Lord one thousand nine hundred  
 and seventy-three.

Sam H. Ennis, Jr.

Chairman, Senate Select Committee on  
 Presidential Campaign Activities

Served on Leonard Garment, on behalf of  
The President.

Time: 6:15

Date: July 23, 1973

Place: Executive Office Bldg, White House

Rufus L. Edmonson

Jerry L. Longue

7/23/73

Received on behalf of the President  
By: Leonard Garment  
Counsel to the President

UNITED STATES OF AMERICA  
CONGRESS OF THE UNITED STATES  
SUBPENA DUCES TECUM

To: President Richard M. Nixon, individually and as President of the United States, The White House, Washington, D.C.

Pursuant to lawful authority, YOU ARE HEREBY COMMANDED to make available to the SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES of the Senate of the United States on the 4<sup>th</sup> day of January, 1974 at 10 a.m. at Room 1418, Dirksen Senate Office Building, all of the materials in your custody or possession, or the possession or custody of the Executive Office of the President, or The White House, actual or constructive, listed in Attachment A, hereto.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

To: \_\_\_\_\_ to serve and

return. Given under my hand, by  
order of the Committee, this 19<sup>th</sup>

Served on: \_\_\_\_\_ day of December in the year of our

By: \_\_\_\_\_ Lord one thousand nine hundred and

Time: \_\_\_\_\_ seventy-three.

Date: \_\_\_\_\_

Place: \_\_\_\_\_

Sam J. Ervin, Jr.  
Chairman, Senate Select Committee  
on Presidential Campaign Activities

ATTACHMENT A

Any and all documents, materials, records and copies thereof including, but not limited to books, files, ledgers, books of accounts, correspondence, receipts, appointment books, diaries, memoranda, checks, check stubs, deposit slips, bank statements, petty cash records, photographs and negatives, recordings, notes, telephone records, credit card vouchers and records, airline and railroad records, relating directly or indirectly, in whole or in part to:

(1) The break-ins on or about May 27, 1972, and on or about June 17, 1972, and electronic surveillance at the Democratic National Committee Headquarters;

(2) The planning or execution of any break-in and/or electronic surveillance at the office, home, or other premise of Herman Greenspun;

(3) Any communications relating to concealment and suppression of information and evidence of the break-ins and electronic surveillance of the Democratic National Committee offices on or about May 27, 1972, and on or about June 17, 1972;

(4) Any offers of or authorizations to offer executive clemency to Messrs. James McCord, G. Gordon



Liddy, E. Howard Hunt, Bernard L. Barker, Eugenio R. Martinez, Frank A. Sturgis, Virgilio R. Gonzales, or any members or former members of President Nixon's White House staff or the Committee to Re-elect the President;

(5) The payment or authorizations of payment of money to Messrs. Liddy, McCord, Hunt, Barker, Martinez, Sturgis, or Gonzales;

(6) Any instructions given or involving any official of the Department of Justice, including officials of the FBI, relating, in whole or in part, directly or indirectly, to any limitation on the investigation of the events involving the break-in and electronic surveillance at the Democratic National Committee Headquarters at the Watergate and related events prior and subsequent thereto, or any limitation on the prosecution of those responsible for such events;

(7) Any discussion or instructions given or involving the Central Intelligence Agency (CIA) (or any official thereof) relating, in whole or in part, directly or indirectly, to any possible involvement by the CIA (or any official thereof) or use of any CIA funds in any financing of or payment of money to Messrs. Liddy, McCord, Hunt, Barker, Martinez, Sturgis, and Gonzales

after June 1, 1973; any contacts, communications, meetings, or telephone calls between the CIA (or any official thereof) and the Federal Bureau of Investigation (or any official thereof) or the Department of Justice (or any official thereof) related, in whole or in part, directly or indirectly, to any Government investigation of the events involving the break-in and electronic surveillance at the Democratic National Committee Headquarters at the Watergate, including but not limited to any Government investigation of possible Republican campaign contribution which allegedly passed through Mexico;

(8) Any discussion or instructions given or involving perjury or possible perjury of anyone connected with the investigation of the events involving the break-in and electronic surveillance at the Democratic Committee Headquarters at the Watergate and related events prior and subsequent thereto, including, but not limited to, the break-in at the office of the psychiatrist of Daniel Ellsberg;

(9) Any discussion or instructions given or involving the "Responsiveness Program" or similar program or programs however designated from the period of January 1, 1971, to November 7, 1972;

(10) The drafting of any public statements on the break-in and electronic surveillance at the Democratic National Committee Headquarters at the Watergate and related events prior and subsequent thereto, including, but not limited to, first and subsequent drafts of the President's statements and speeches made on August 29, 1972; April 17, 1973; April 30, 1973; May 9, 1973; May 22, 1973; and August 15, 1973;

(11) ' The investigation conducted by John D. Ehrlichman of the "Watergate Incident" at the request of the President and reports thereof to the President and/or to any other individual including but not limited to that made to the President on April 14, 1973;

(12) The taping of any conversation between the President and John W. Dean on April 15, 1973, or the taping of any recollection thereof as referred to by the President in his conversation with Assistant Attorney General Henry Petersen on or about April 15, 1973, including but not limited to any tape, dictabelt, transcripts, or notes relating to this conversation;

(13) The report from Assistant Attorney General Henry Petersen to the President concerning the Watergate investigation including but not limited to the memorandum submitted to the President on or about

April 15, 1973;

(14) All "Political Matters Memoranda" and all "tabs," "attachments," or "appendices" thereto from Gordon Strachan to H. R. Haldeman from January 1, 1971, to December 31, 1972;

(15) As identified in exhibit #106 in the hearing "In Re: Subpenas Duces Tecum Issued to President Richard M. Nixon for Production of Tapes" before Judge Sirica, the following contents of H. R. Haldeman files labeled:

"Jan-Mar 1973 Notes of Haldeman";

"April 1973 Notes of Haldeman";

"Haldeman Notes Apr-May-June '72";

"Feb/Mar 73";

"April 73";

"Strachan Chron HRH Book #III Dec 1971";

"Chron file Strachan Memo to HRH June 1971";

"Chron file Strachan HRH only Book #1 March & April";

"HRH Talking Papers March/April 1972;

"Chron file Strachan, Mar 72 A-L (1), Mar 72 M-Z (2), Apr 72 A-L (1), Apr 72 M-Z (2)";

"13-Camp. 12-17/-31-71";

"File #21, Strung (sic) file";

"HRH & AG Meeting 6/30/71";  
 "File #13, Straugh (sic) file";  
 "Part IV March 3-28, 72 18-campaign";  
 "HRH Talking Papers 1971";  
 "Talking Papers 1972";  
 "Talking Papers-Feb/Mar 1972";  
 "H to AG 1-31-72";  
 "Campaign 72 #14 Jan 1";  
 "Campaign 72 #15";  
 "HRH Political File (Personal-Confidential) April 1971";  
 "Jack Gleason Report #16 through Nov. 6, 1970 (3 pgs)";  
 "Jack Gleason Report #15 through Oct. 31, 1970 (3 pgs)";  
 "Jack Gleason Report #14 through Oct. 23, 1970 (2 pgs)";  
 "Jack Gleason Reports #1 through #13";  
 "Memoranda for H. R. Haldeman from Charles Colson, subject ITT  
 (16) A memorandum dated June 30, 1971, from Mar. 20/72;

Herbert Klein to H. R. Haldeman. Haldeman on the  
 subject of ITT's \$400,000 support for the Republican  
 Convention;

(17) A memorandum of April, 1969, from Deputy  
 Attorney General R. Kleindienst and Assistant Attorney  
 General McLaren to J. D. Ehrlichman regarding ITT;

(18) A memorandum of April, 1970, from T. Hullen  
 to Assistant Attorney General R. McLaren regarding ITT;

(19) A memorandum of September, 1970, from J. D.  
 Ehrlichman to Attorney General J. Mitchell regarding ITT;

(20) A memorandum dated May 5, 1971, from J. D. Ehrlichman to Attorney General Mitchell regarding ITT;

(21) A memorandum on or about May 5, 1971, from J. D. Ehrlichman to the President regarding ITT;

(22) Duties and/or services of John Caulfield on behalf of Richard M. Nixon including but not limited to those for which he was compensated and thanked on or about December 25, 1970;

(23) "Project Sandwedge" or any and all private security or investigative organizations or plans relating thereto involving John Caulfield, Vernon Acree, Myles Ambrose, Roger Barth, and/or Joseph Woods;

(24) Lawrence O'Brien and any corporation, partnership, or business entity owned in whole or in part by Lawrence O'Brien, including, but not limited to, the memorandum from H. R. Haldeman to John Dean, subject Larry O'Brien, dated on or about January 8, 1971, and the files on Larry O'Brien maintained by H. R. Haldeman, Rose Mary Woods, John Dean, John Ehrlichman, and John Caulfield;

(25) Any or all records and documentation of access to the original and copies of tape recordings of Presidential conversations, from the installation of the taping system to December 19, 1973, including, but not limited to, the documentation of access referred to in Mr. Buzhardt's letter to Mr. Cox of July 25, 1973;

(26) Any and all records and documentation of access to the files of H. R. Haldeman, J. D. Ehrlichman, John W. Dean, and Charles W. Colson from the date of the termination of their employment with the Executive Office of the President to the present;

(27) Copies of all Executive Protective Service Clearance Form #21 forms from the San Clemente Presidential Compound for July 3, 4, and 5, 1970;

(28) 'Executive Protective Clearance Form #21 forms for the White House, the Executive Office Building, Camp David, and the San Clemente and the Key Biscayne Presidential Compounds for Richard Danner, Robert Maheu, Charles G. Rebozo, Robert Abplanalp, I. G. "Jack" Davis, James Crosby, Seymour Alter, Franklin S. DeBoer, from January 1, 1969, to the present;

(29) Any and all records of contributions to the Presidential Campaign of 1972 and/or of any compensation to Richard M. Nixon maintained by Rose Mary Woods;

(30) "President Richard Nixon's Daily Diary" for January 1, 1970, to December 19, 1973;

(31) Telephone records from January, 1971, to December 15, 1973, for all phones in the following locations:

The Oval Office

The President's Executive Office Building Office

The Lincoln Sitting Room

The Second Floor Residence in the White House

500 Bay Lane and 516 Bay Lane in the Key Biscayne  
Compound

Casa Pacifica

Aspen Cabin, Camp David

Dogwood Cabin, Camp David

Mr. Haldeman's office and home extension

Mr. Ehrlichman's office and home extension

Mr. Bull's office and home extension

Miss Woods' office and home extension

Mr. Haig's office and home extension

Mr. Richard Moore's office and home extension

Mr. Colson's office and home extension

Mr. Hunt's office and home extension

Mr. Higby's office and home extension

Mr. Strachan's office and home extension

(32) Any relationship between F. Donald Nixon and any of the following individuals or organizations; Charles Adams, Emilio Aguado, Arthur Blech, E. L. "Jack" Cleveland, Gene Bowen, Howard Cerny, R. W. Chambers, James Crosby, Mr. Dahl, I. G. "Jack" Davis, John Dean, Henry Eddy, John Ehrlichman, Robert Finch, Virgil Gladieux, Louis Gonzalez, Rolando Gonzalez, Herman Greenspun, Mr. Grotsis, William Haddad, Anthony Hatsis, Dennis Hill, Patrick Hillings, Barry Hallqmare, William Hallqmare, Howard Hughes, Herbert Kalmbach,



Herbert Klein, Dr. Isaac Newton Kraushaar, Frederick LaRue, Norman Locatis, Robert Maheu, John Meier, Cliff Miller, Meyer Minchen, John Mitchell, Ray Murphy, Rita Murray, Thomas Murray, Charles G. Rebozo, Mr. Thatcher, Leonard Traynor, John Suckling, Robert Vesco, ABC Gladioux Corporation, Air West Airlines, Atlas Corporation, Basic Industries, Inc., Georgetown Resources, Hallamore Homes, Hughes Air Corporation, Hughes Tool Company, International Dye Foundation, J-TEC Associates, Robert A. Maheu Associates, Meier-Murray Productions, National Biff-Burger Systems, Inc., National Bulk Carriers, Nevada Environmental Foundation, Richard Nixon Foundation, Oceanographic Fund, Inc., Ogden Foods, Resorts International, San/Bar Electronics, Separation Recovery Systems, Inc., Summa Corporation, Toledo Mining Company;

(33) Any memoranda or reports on Donald A. Nixon, F. Donald Nixon, or Edward Nixon or their activities, including, but not limited to any memoranda or reports prepared by John Ehrlichman, John Dean, John Mitchell, Fred LaRue, Stanley McKiernan, or Cliff Miller;

(34) All logs, summaries, transcripts, tapes, and reports associated with any electronic and/or physical surveillances of F. Donald Nixon;

(35) The solicitation, negotiation, delivery and/or storage of a \$100,000 contribution to the Presidential Campaign of 1972 from Howard Hughes or

the Hughes Tool Company to Charles G. Rebozo and/or the return of said contribution to Howard Hughes, the Hughes Tool Company, Summa Corporation, Chester Davis, or any agent, representative, or designee of the Davis and Cox law firm;

(36) Any memoranda to or from Richard M. Nixon, Charles G. Rebozo, John Mitchell, John D. Ehrlichman, H. R. Haldeman, Charles W. Colson, Herbert Kalmbach, Herbert Klein, John Dean, John Caulfield, Rose Mary Woods,

Richard Kleindiesnt, Richard McLaren relating to the acquisition of Air West by the Hughes Tool Company (hereafter known as HTCo), the acquisition of the Dunes Hotel in Las Vegas, Nevada by HTCo, the resolution of litigation between Trans World Airlines and HTCo, and the cessation of nuclear testing in Nevada;

(37) The actual copy of each daily news summary from January 1, 1972, to December 19, 1973, that was transmitted to the President and upon which he made handwritten notations or instructions, whenever, such handwritten notations or instructions relate, directly or indirectly, in whole or in part, to the events, individuals, and organizations referenced in items 1 through 36 above.

UNITED STATES OF AMERICA  
CONGRESS OF THE UNITED STATES  
SUBPENA DUCES TECUM

To: President Richard M. Nixon, The White House, Washington, D. C.

Pursuant to lawful authority, YOU ARE HEREBY COMMANDED to make available to the SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES of the Senate of the United States, on ~~December 27, 1973~~ <sup>JANUARY 4, 1974</sup>, at 10 a.m., at Room 1418 Dirksen Senate Office Building, all materials listed on Attachment A, hereto.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

TO \_\_\_\_\_ to serve and return.

Given under my hand, by order of the Committee, this ~~18~~ <sup>17</sup> day of December in the year of our Lord one thousand nine hundred and seventy-three.

Chairman, Senate Select Committee  
on Presidential Campaign Activities

Served on:

By:

Time:

Date:

Place:

ATTACHMENT A

All records in your personal custody or in the custody or control of the Executive Office of the President or the White House, including any tape recording, summary or any other record, whether written or otherwise, for the period January 1, 1970, to and including December 17, 1973, relating to: (A) price support levels for milk and dairy products; (B) import quotas for dairy products; (C) meetings between the President and representatives of dairy farmer groups in September, 1970, on March 23, 1971, and in September, 1971; (D) a meeting on March 23, 1971, between the President and certain Presidential advisors concerning milk price supports; (E) political contributions by the dairy industry, dairy farmers or dairy political groups or trusts to the Presidential Campaign of 1972; (F) the case of Nader v. Butz, civil action number 148-72, currently pending before the United States District Court for the District of Columbia; (G) an investigation by the Department of Justice of Associated Milk Producers, Inc., and a subsequent civil antitrust suit filed by the Department on or about February 1, 1972, and currently pending against Associated Milk Producers, Inc.; (H) an audit or investigation conducted by the Internal Revenue Service of the income tax return of Milk Producers, Inc.; and (I) conversations, meetings or other

communications between the President and Presidential advisors, including cabinet members, relating to matters (A) through (H); including but not limited to the following:

1. A memorandum dated January 18, 1971, concerning the 1971 - 1972 dairy price support program. Attached to this memorandum are various charts and economic information, and a Department of Agriculture memorandum regarding dairy price supports dated January 7, 1971. Also attached is a memorandum of the Office of Management and Budget (OMB) dated March 3, 1971, setting forth various recommendations and considerations with respect to the 1971 - 1972 price support program.
2. A memorandum, dated February 2, 1971, between officials within the White House Office concerning a proposed meeting by the President with leaders of the dairy industry.
3. A memorandum, dated February 2, 1971, between officials within the White House Office concerning a proposed meeting by the President with leaders of the dairy industry.
4. A memorandum, dated February 4, 1971, between officials within the White House Office concerning a proposed meeting by the President with leaders of the dairy industry.
5. A memorandum, dated February 16, 1971, between officials within the White House Office concerning a proposed meeting by the President with leaders of the dairy industry.

6. An undated document containing notes prepared by a White House Office official concerning a proposed meeting by the President with leaders of the dairy industry.

7. A memorandum, dated February 24, 1971, between officials within the White House Office concerning a proposed meeting by the President with leaders of the dairy industry.

8. A memorandum, dated March 3, 1971, between officials within the White House Office to which is attached another memorandum, dated February 24, 1971, between officials in the White House Office concerning a proposed meeting by the President with leaders of the dairy industry.

9. A memorandum dated March 3, 1971, between personnel in the Office of the Council of Economic Advisors.

10. A memorandum, dated March 4, 1971, from the Assistant Director, OMB, to the Director, OMB, and a Presidential assistant and regarding the dairy price support program.

11. A memorandum, dated March 5, 1971, from the Assistant Director, OMB, to the Director, OMB, copies of which were transmitted to Presidential assistants, concerning the dairy price support program.

12. A memorandum, dated March 5, 1971, from officials within the White House Office.

13. A memorandum, dated March 4, 1971, from the Director, OMB, to a Presidential assistant regarding the dairy price support program.

14. An undated memorandum between personnel within the White House Office to which is attached a copy of the March 4, 1971, memorandum from the Assistant Director, OMB, to the Director, OMB, and a Presidential assistant, previously referred to in paragraph 10 above.

15. A memorandum from a Presidential assistant, dated March 5, 1971, to another Presidential assistant and Director, OMB, regarding the dairy price support program.

16. A memorandum from a Presidential assistant to another Presidential assistant and the Director, OMB, dated March 5, 1971, regarding dairy price supports.

17. A memorandum from a Presidential assistant to another Presidential assistant, dated March 5, 1971, regarding the dairy price support program, to which is attached a typed restatement of the same memorandum.

18. A memorandum from a Presidential assistant to another Presidential assistant and the Director, OMB, dated March 5, 1971, to which is attached the March 4, 1971, memorandum previously referred to in paragraph 10.

19. A memorandum from a Presidential assistant to the Director, OMB, dated March 9, 1971, regarding the dairy price support program.

20. A memorandum for the President, dated March 9, 1971 from the Director, OMB.

21. Memorandum dated September 16, 1970, from one White House assistant to another with attached handwritten page.

22. A memorandum from a Presidential assistant to another Presidential assistant, dated March 12, 1971 regarding the dairy price support program.

23. A memorandum from a Presidential assistant to another Presidential assistant, dated March 18, 1971, to which is attached a memorandum, dated March 16, 1971, from a Presidential assistant to another Presidential assistant regarding the dairy price support program.

24. A memorandum, dated March 19, 1971, from a Presidential assistant to another Presidential assistant regarding the dairy price support program.

25. A memorandum for the President from a Presidential assistant, dated March 22, 1971. Attached to this memorandum are a list of prospective attendees at a Presidential meeting with dairy industry leaders, a proposed statement to be made by the President at such meeting, and a fact memorandum prepared by the Department of Agriculture concerning the dairy industry.

26. A memorandum, dated March 23, 1971, from a Presidential assistant to another Presidential assistant regarding the meeting with dairy industry leaders.

27. A memorandum, dated March 23, 1971, from a Presidential assistant to the President's file concerning the President's meeting with dairy industry leaders.



28. A memorandum from a Presidential assistant to another Presidential assistant, dated March 24, 1971, concerning the possibility of the President's attending an annual meeting of a dairy farmer cooperative association.

29. A memorandum from the Undersecretary of Agriculture to the Assistant Director, OMB, dated March 24, 1971, to which is attached a proposed press release.

30. A memorandum for the record from a Presidential assistant, dated March 25, 1971, regarding the President's meeting with dairy industry leaders on March 23, 1971.

31. A memorandum from one Presidential assistant to another Presidential assistant dated December 18, 1970, discussing the dairy industry and its representatives.

32. A memorandum dated March 23, 1971, from a Presidential assistant to the President's file concerning a Presidential meeting with other governmental officials involving decision making with respect to the dairy price support program.

33. A memorandum, dated July 16, 1971, from a Presidential assistant to another Presidential assistant regarding a Presidential address to a dairy farmer cooperative association.

34. A memorandum, dated July 22, 1971, from a Presidential assistant to another Presidential assistant which refers, among other things, to the dairy price support program.

35. A memorandum from a Presidential assistant to another Presidential assistant, dated July 27, 1971, regarding a proposed speech by the President to a dairy farmer cooperative association to which is attached a memorandum containing various considerations for use in the proposed speech.

36. A memorandum, dated November 22, 1971, from a Presidential assistant to the President's file concerning the dairy price support program.

37. A memorandum from a Presidential assistant to the file, dated March 8, 1972, regarding the dairy price support program.

38. A memorandum from a Presidential assistant to another Presidential assistant, dated March 7, 1972, regarding the dairy price support program.

39. A memorandum, dated March 6, 1972, from a Presidential assistant to another Presidential assistant regarding the dairy price support program.

40. A memorandum from a Presidential assistant to another Presidential assistant, dated March 9, 1972, regarding the dairy price support program.

41. Memorandum from one Presidential assistant to another dated August 8, 1970.

42. A memorandum from the Secretary of Agriculture to a Presidential assistant, dated July 19, 1972.

43. Memoranda, dated February 1, 1972, February 1, 1972, August 31, 1972, September 28, 1972, and December 15, 1972, from the Counsel to the President to Presidential assistants concerning the pending case of Nader v. Butz. Attached to the February 1, 1972, memoranda is a routing slip from a Presidential assistant to the Counsel to the President returning the memoranda for the sender's files.

44. A memorandum dated August 12, 1970, from a Presidential assistant to another Presidential Assistant regarding a meeting with dairy industry leaders.

45. A memorandum dated September 2, 1970, from a Presidential Assistant to another Presidential Assistant through a third Presidential Assistant regarding a meeting between the President and dairy industry leaders.

46. An undated memorandum prepared for the President by a Presidential Assistant, setting forth the President's schedule of meetings for a one-hour period on September 9, 1970, which includes reference to a meeting with two dairy industry leaders. Attached is an undated briefing memorandum for the President from a Presidential Assistant relating to the referenced meetings.

47. Memorandum for the Director of the Office of Management and Budget from an assistant to the Director dated March 24, 1971, on the subject of dairy price supports.

48. Memorandum from one Presidential assistant to another dated March 10, 1971, on the subject of cheese imports with a brief reference to parity levels, and with a covering note transmitting the memorandum to a third Presidential assistant.

49. An undated and unsigned cover note, attached to the copy of a memorandum for the President dated March 9, 1971, from a Presidential assistant, which discusses the position of the Secretary of Agriculture on the price support level at that time.

50. Memorandum dated March 6, 1972, from one Presidential assistant to another on the subject of milk price support levels to which is attached a routing slip dated March 6, 1972.

51. Memorandum dated February 27, 1970, from one Presidential assistant to another to which is attached seven pages of handwritten notes.

52. Memorandum from one Presidential assistant to another on the subject of milk producers dated June 24, 1970, with attachment.

53. Memorandum from one Presidential assistant to another dated August 13, 1970.

54. Memorandum from one Presidential assistant to another dated September 16, 1970, to which are attached two reports of messages.

55. Memorandum dated September 16, 1970, from one White House assistant to another with attached handwritten page.

56. Memorandum from one Presidential assistant to another dated November 3, 1970, with attached newspaper article and attached memorandum dated November 2, 1970, from one Presidential assistant to another.

57. Memorandum dated September 29, 1971, from one White House assistant to another with attached routing slip.

58. Memorandum from one Presidential assistant to another dated August 8, 1970.

59. A memorandum dated March 7, 1972, from an official within the Council of Economic Advisors to the Chairman, CEA.

60. A memorandum dated February 15, 1973, for the President from the Chairman of the Council of Economic Advisors to which is attached a letter to the President from the Secretary of Agriculture dated February 14, 1973, and a memorandum to the Chairman, CEA, from an official within the CEA dated February 13, 1973.

61. An undated memorandum from the Assistant Director, OMB, to the Director, OMB, to which are attached three internal OMB memoranda, dated respectively, March 8, 1972, March 7, 1972, and March 7, 1972.

62. A memorandum between personnel in the Office of Management and Budget dated November 6, 1972.

63. A memorandum from an official in the Department of Agriculture to the Assistant Director, OMB, dated January 26, 1973, to which is attached an internal Department of Agriculture analysis which involves the dairy price support program with particular regard to cheese import quotas.

64. An undated internal memorandum within the Office of Management and Budget concerning the 1973-74 dairy price support program to which are attached various documents, some of which are in draft form, concerning the dairy price support program.

65. A memorandum dated January 13, 1972, to an Assistant Director, OMB, from an official within the Office of Management and Budget, to which various charts and explanatory material are attached.

66. A memorandum between personnel within the Office of Management and Budget dated December 10, 1972, to which is attached a memorandum within the Office of Management and Budget dated December 20, 1972.

67. Portions of a memorandum dated June 3, 1971, with two attachments dated May 27, 1971, concerning dairy import investigations under the Agricultural Adjustment Act of 1933.

68. An undated memorandum notation by a Presidential assistant to which there is attached a memorandum from the Undersecretary of Agriculture to a Presidential assistant dated March 22, 1971. Also attached is a memorandum setting forth considerations regarding the dairy industry.

69. An undated sheet of handwritten notes making reference to the price support program.

70. White House and Executive Office logs or records for the persons listed below, of meetings, conversations, telephone calls or any other contacts or communications during the period January 1, 1970, to and including December 17, 1973, relating to matters (A) - (I) described above:

- |                     |                      |
|---------------------|----------------------|
| (1) the President   | (9) Jack Gleason     |
| (2) Henry Cashen    | (10) H. R. Haldeman  |
| (3) Murray Chotiner | (11) John Mitchell   |
| (4) Charles Colson  | (12) Donald Rice     |
| (5) John Connally   | (13) Gordon Strachan |
| (6) John Dean       | (14) George Shultz   |
| (7) Harry Dent      | (15) John Whittaker  |
| (8) John Ehrlichman | (16) David Wilson    |

UNITED STATES OF AMERICA  
CONGRESS OF THE UNITED STATES  
SUBPENA DUCES TECUM

To: President Richard M. Nixon, individually and as President of the United States, The White House, Washington, D.C.

Pursuant to lawful authority, YOU ARE HEREBY COMMANDED to make available to the SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES of the Senate of the United States on the 4th day of January, at 10 a.m. at Room 1418, Dirksen Senate Office Building, all of the materials in your custody or possession, or the possession or custody of the Executive Office of the President, or The White House, actual or constructive, listed in Attachment A, hereto.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

To \_\_\_\_\_ to serve and

return. Given under my hand, by order of the Committee, this 17th day of December in the year of our Lord one thousand nine hundred and seventy-three.

Served on:

By:

Time:

Date:

Place:

*Sam. J. Friedman, Jr.*  
Friedman, Special Counsel to the  
Senate Select Committee on Presidential  
Campaign Activities



ATTACHMENT A

Any and all tape recordings, other electronic and/or mechanical recordings or reproductions, memoranda, notes, transcripts, files, correspondence, diaries, telephone records, writings or other materials relating to the following meetings and telephone calls:\*

\*Note: In regard to the conversations and meetings listed in the subpoena, when more than one participant (other than the President) is listed as present at a meeting, all participants were not necessarily present throughout the entire meeting.

The following telephone calls and meetings including, but not limited to, all tape recordings, memoranda, notes, telephone records, files, and correspondence related thereto:

<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
Nov. 17, 1973	9:30 a.m.	11:25 a.m.	President met with Mr. Ziegler	Key Biscayne
	12:18 p.m.	12:19 p.m.	President called Miss Woods	Key Biscayne Phone
	12:21 p.m.	12:22 p.m.	President called Miss Woods	Key Biscayne Phone
	1:35 p.m.	2:10 p.m.	President met with Mr. Ziegler	Key Biscayne
	11:59 p.m.	12:04 a.m.	President called Mr. Colson	Key Biscayne Phone
Nov. 16, 1973	11:05 a.m.	11:46 a.m.	President met with Gen. Haig and Mr. Ziegler	Oval Office
	11:46 a.m.	12:07 a.m.	President met with Messrs. Powers, Buzhardt, Ziegler	Oval Office
	7:15 p.m.	8:15 p.m.	President, Mrs. Nixon met with Mr. Rebozo, Miss Woods (dinner)	Key Biscayne
Nov. 15, 1973	12:36 p.m.	1:15 p.m.	President met with Gen. Haig	Oval Office
	1:18 p.m.	Unknown	President called Miss Woods	EOB Phone
	1:21 p.m.	Unknown	President called Mr. Ziegler	EOB Phone
	1:29 p.m.	1:46 p.m.	President met with Mr. Ziegler	President's EOB Office

<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
Nov. 15, 1973 (Cont'd.)	2:43 p.m.	2:46 p.m.	President met with Mr. Bull	President's EOB Office
	2:47 p.m.	Unknown	President called Mr. Ziegler	EOB Phone
	2:55 p.m.	3:01 p.m.	President met with Mr. Ziegler	President's EOB Office
	3:01 p.m.	3:07 p.m.	President met with Miss Woods	President's EOB Office
	3:07 p.m.	3:17 p.m.	President met with Mr. Ziegler	President's EOB Office
	3:17 p.m.	3:23 p.m.	President met with Miss Woods	President's EOB Office
	3:23 p.m.	Unknown	President called Mr. Ziegler	EOB Phone
	3:25 p.m.	3:26 p.m.	President called Mr. Bull	EOB Phone
	3:29 p.m.	3:35 p.m.	President met with Mr. Ziegler	President's EOB Office
	4:15 p.m.	4:16 p.m.	President called Miss Acker	Residence Phone
	4:34 p.m.	5:07 p.m.	President met with Messrs. Ziegler, Buzhardt, and Gen. Haig	Oval Office
	6:45 p.m.	6:53 p.m.	President met with Miss Woods	Oval Office
	6:53 p.m.	7:17 p.m.	President met with Mr. Ziegler, Gen. Haig, Miss Woods	Oval Office

<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
Nov. 15, 1973 (Cont'd.)	9:55 p.m.	11:15 p.m.	President met with Gen. Haig	Residence
	10:32 p.m.	10:37 p.m.	President called Mr. Ziegler	Residence Phone
	11:14 p.m.	11:18 p.m.	President called Mr. Ziegler	Residence Phone
Oct. 1, 1973	2:08 p.m.	2:15 p.m.	President met with Miss Woods	President's EOB Office
	2:25 p.m.	2:41 p.m.	President met with Mr. Ziegler	President's EOB Office
	2:44 p.m.	2:47 p.m.	President called Rebozo	EOB Phone
	2:45 p.m.	3:05 p.m.	President met with Gen. Haig	President's EOB Office
Sept. 29, 1973	9:19 a.m.	9:36 a.m.	President met with Mr. Ziegler	Oval Office
	9:37 a.m.	9:50 a.m.	President met with Gen. Haig	Oval Office
	12:26 p.m.	12:45 p.m.	President with Gen. Haig	Oval Office
	1:58 p.m.	2:05 p.m.	President met with Mr. Bull and Miss Woods	Camp David Dogwood Cabin
	2:09 p.m.	2:21 p.m.	President called Gen. Haig	Camp David Aspen Lodge Phone
	2:23 p.m.	2:36 p.m.	President called Donald Nixon	Camp David Aspen Lodge Phone
	4:46 p.m.	4:49 p.m.	President called Mr. Ziegler	Camp David Aspen Lodge Phone

<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
Sept. 29, 1973 (Cont'd.)	6:19 p.m.	6:50 p.m.	President met with Miss Woods	Camp David Aspen Lodge
	6:42 p.m.	6:53 p.m.	President called Gen. Haig	Camp David Aspen Lodge Phone
	6:54 p.m.	7:02 p.m.	President called Mr. Bužhardt	Camp David Aspen Lodge Phone
	7:30 p.m.	7:35 p.m.	President met with Miss Woods	Camp David Aspen Lodge
June 4, 1973	9:00 a.m. (Approximate times)	10:00 p.m.	President (including short meetings with Messrs. Bull, Ziegler, Dr. Kissinger, and review of Presidential tapes)	President's EOB Office
Apr. 30, 1973	11:24 p.m.	11:28 p.m.	President called Colson	Unknown
Apr. 29, 1973	2:49 p.m.	3:25 p.m.	President met with Mr. Ehrlichman	Unknown
Apr. 27, 1973	6:49 p.m.	8:00 p.m.	President met with Mr. Haldeman	Unknown
Apr. 26, 1973	8:55 a.m.	10:24 a.m.	President met with Mr. Haldeman	Unknown
	3:52 p.m.	3:54 p.m.	Mr. Haldeman called President	Unknown
	3:59 p.m.	9:03 p.m.	President met with Messrs. Haldeman, Ehrlichman, Bull, and Ziegler	Unknown
Apr. 25, 1973	11:06 a.m.	1:55 p.m.	President met with Messrs. Haldeman and Ehrlichman	Unknown

<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
Apr. 25, 1973 (Cont'd.)	4:40 p.m.	5:35 p.m.	President met with Mr. Haldeman	Unknown
	6:57 p.m.	7:14 p.m.	President called Mr. Haldeman	Unknown
	7:46 p.m.	7:53 p.m.	President called Mr. Haldeman	Unknown
Apr. 22, 1973	7:55 a.m.	8:21 a.m.	President called Mr. Colson	Key Biscayne Phone
	8:24 a.m.	8:39 a.m.	President called Mr. Dean	Key Biscayne Phone
	9:45 a.m.	10:16 a.m.	President called Mr. Haldeman	Unknown
	10:26 a.m.	10:38 a.m.	President called Mr. Ehrlichman	Key Biscayne Phone
Apr. 20, 1973	8:15 a.m.	8:39 a.m.	President met with Mr. Haldeman	Oval Office
	11:07 a.m.	11:23 a.m.	President met with Mr. Haldeman	Oval Office
	11:32 a.m.	11:40 a.m.	President called Mr. Petersen	Oval Office Phone
	12:15 p.m.	12:34 p.m.	President met with Messrs. Haldeman and Ehrlichman	Oval Office
	12:34 p.m.	12:37 p.m.	President met with Mr. Moore	Oval Office

<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
Apr. 20, 1973 (Cont'd.)	12:57 p.m.	1:40 p.m.	President met with Mr. Ziegler	Spirit of '76
	3:53 p.m.	3:58 p.m.	President called Mr. Petersen	Key Biscayne Residential Phone
	5:29 p.m.	5:41 p.m.	President called Mr. Ziegler	Key Biscayne Pool Phone
Apr. 19, 1973	9:31 a.m.	10:12 a.m.	President met with Messrs. Haldeman and Ehrlichman	Oval Office
	10:12 a.m.	11:07 a.m.	President met with Mr. Petersen	Oval Office
	12:29 p.m.	12:48 p.m.	President met with Mr. Ziegler	Oval Office
	1:03 p.m.	1:30 p.m.	President met with Mr. Ehrlichman	Oval Office
	1:39 p.m.	1:41 p.m.	President called Mr. Ziegler	EOB Phone
	1:45 p.m.	1:46 p.m.	President called Mr. Ziegler	EOB Phone
	1:48 p.m.	1:50 p.m.	President called Mr. Ehrlichman	EOB Phone
	3:38 p.m.	Unknown	President called Mr. Moore	EOB Phone
	3:46 p.m.	5:00 p.m.	President met with Mr. Moore	President's EOB Office

<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
Apr. 19, 1973 (Cont'd.)	5:15 p.m.	5:45 p.m.	President met with Mr. Ehrlichman	President's EOB Office
	5:58 p.m.	5:59 p.m.	President talked with Mr. Ehrlichman	EOB Phone
	6:00 p.m.	6:03 p.m.	Mr. Ehrlichman called President	President's EOB Office
	8:26 p.m.	9:32 p.m.	President met with Messrs. Wilson and Strickler	President's EOB Office
	9:37 p.m.	9:53 p.m.	President called Mr. Haldeman	EOB Phone
	10:54 p.m.	11:04 p.m.	Mr. Ehrlichman called President	Residence Phone
Apr. 18, 1973	12:05 a.m.	12:20 a.m.	President called Mr. Haldeman	Residence Phone
	8:11 a.m.	8:38 a.m.	President met with Messrs. Haldeman, Ziegler	Oval Office
	12:25 p.m.	12:33 p.m.	President met with Messrs. Haldeman, Ziegler	Oval Office
	2:50 p.m.	2:56 p.m.	President called Mr. Petersen	EOB Phone
	3:05 p.m.	3:23 p.m.	President met with Mr. Ehrlichman	Oval Office



<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
Apr. 18, 1973 (Cont'd.)	6:28 p.m.	6:37 p.m.	President called Mr. Petersen	Camp David Aspen Lodge Phone
	6:30 p.m.	8:05 p.m.	President met with Messrs. Haldeman, Ehrlichman	Aspen Lodge
	8:07 p.m.	8:18 p.m.	President called Mr. Ziegler	Aspen Lodge Phone
	8:18 p.m.	8:20 p.m.	President called Mr. Ehrlichman	Aspen Lodge Phone
	8:21 p.m.	8:23 p.m.	President called Mr. Ziegler	Aspen Lodge Phone
Apr. 17, 1973	9:19 a.m.	9:25 a.m.	President called Mr. Dean	Oval Office Phone
	9:30 a.m.	9:46 a.m.	President met with Mr. Garment	Oval Office
	9:47 a.m.	9:59 a.m.	President met with Mr. Haldeman	Oval Office
	12:35 p.m.	2:20 p.m.	President met with Messrs. Haldeman, Ehrlichman, Ziegler	Oval Office
	2:30 p.m.	2:40 p.m.	President met with Mr. Ziegler	Oval Office
	2:39 p.m.	2:40 p.m.	President called Mr. Ehrlichman	Oval Office Phone
	2:46 p.m.	3:49 p.m.	President met with Mr. Petersen	Oval Office
	3:50 p.m.	4:35 p.m.	President met with Messrs. Haldeman, Ehrlichman	Oval Office

<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATIONS</u>
Apr. 17, 1973 (Cont'd.)	4:48 p.m.	5:03 p.m.	President met with Mr. Ziegler	Oval Office
	6:17 p.m.	6:21 p.m.	President called Mr. Ziegler	EOB Phone
	5:50 p.m.	7:14 p.m.	President met with Messrs. Haldeman, Ehrlichman	President's EOB Office
Apr. 18, 1973	12:08 a.m.	12:23 a.m.	President called Mr. Haldeman	Unknown
	8:18 a.m.	8:22 a.m.	President called Mr. Ehrlichman	Unknown
	9:50 a.m.	9:59 a.m.	President met with Messrs. Haldeman and Ehrlichman	Oval Office
	10:00 a.m.	10:40 a.m.	President met with Mr. Dean	Oval Office
	10:50 a.m.	11:04 a.m.	President met with Messrs. Haldeman, Ehrlichman	Oval Office
	12:00 p.m.	12:31 p.m.	President met with Messrs. Haldeman, Ehrlichman	Unknown
	12:58 p.m.	1:37 p.m.	President met with Mr. Ziegler	Oval Office
	1:39 p.m.	3:25 p.m.	President met with Messrs. Petersen, Ziegler	President's EOB Office
	3:25 p.m.	3:26 p.m.	President met with Mr. Ziegler	President's EOB Office
	3:27 p.m.	4:04 p.m.	President met with Messrs. Ehrlichman, Ziegler	President's EOB Office
	4:04 p.m.	4:05 p.m.	President called Mr. Dean	President's EOB Phone

<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATIONS</u>
Apr. 16, 1973 (Cont'd.)	4:07 p.m.	4:35 p.m.	President met with Mr. Dean	President's EOB Office
	8:58 p.m.	9:14 p.m.	President called Mr. Petersen	EOB Phone
	9:27 p.m.	9:49 p.m.	Mr. Ehrlichman called President	Residence Phone
Apr. 15, 1973	12:09 a.m.	12:16 a.m.	President called Gen. Haig	Unknown
	1:01 a.m.	1:04 a.m.	President called Mr. Ziegler	Unknown
	10:13 a.m.	10:15 a.m.	Mr. Kleindienst called President	Unknown
	10:35 a.m.	11:15 a.m.	President met with Mr. Ehrlichman	Oval Office
	1:12 p.m.	2:22 p.m.	President met with Mr. Kleindienst	President's EOB Office
	2:30 p.m.	3:30 p.m.	President met with Mr. Ehrlichman	President's EOB Office
	3:27 p.m.	3:44 p.m.	President called Mr. Haldeman	EOB Phone
	3:48 p.m.	3:49 p.m.	Mr. Kleindienst called President	EOB Phone
	4:00 p.m.	5:15 p.m.	President met with Messrs. Kleindienst, Petersen	President's EOB Office
	7:50 p.m.	9:15 p.m.	President met with Messrs. Ehrlichman, Haldeman	President's EOB Office

<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
Apr. 15, 1973 (Cont'd.)	8:14 p.m.	8:18 p.m.	President called Petersen	EOB Phone
	8:25 p.m.	8:26 p.m.	President called Mr. Petersen	EOB Phone
	9:17 p.m.	10:12 p.m.	President met with Mr. Dean	President's EOB Office
	9:39 p.m.	9:41 p.m.	President called Mr. Petersen	EOB Phone
	10:16 p.m.	11:15 p.m.	President met with Messrs. Haldeman, Ehrlichman	President's EOB Office
	11:45 p.m.	11:53 p.m.	President called Mr. Petersen	Residence Phone
Apr. 14, 1973	8:55 a.m.	11:31 a.m.	President met with Messrs. Haldeman, Ehrlichman	President's EOB Office
	11:32 a.m.	12:30 p.m.	President met with Gen. Haig, Dr. Kissinger	President's EOB Office
	1:55 p.m.	2:13 p.m.	President met with Mr. Haldeman	Oval Office
	2:24 p.m.	3:55 p.m.	President met with Messrs. Haldeman, Ehrlichman	Oval Office
	5:15 p.m.	6:45 p.m.	President met with Messrs. Haldeman, Ehrlichman	President's EOB Office
	11:02 p.m.	11:16 p.m.	President called Mr. Haldeman	Residence Phone
	11:22 p.m.	11:53 p.m.	President called Mr. Ehrlichman	Residence Phone

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<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
Apr. 13, 1973	9:16 a.m.	10:47 a.m.	President met with Mr. Ehrlichman	Oval Office
	11:22 a.m.	11:40 a.m.	President met with Mr. Haldeman	Oval Office
	12:59 p.m.	1:29 p.m.	President met with Mr. Ehrlichman	Oval Office
	2:50 p.m.	4:20 p.m.	President met with Messrs. Haldeman, Ehrlichman	President's EOB Office
	4:22 p.m.	4:26 p.m.	President met with Mr. Ehrlichman	Oval Office
	5:48 p.m.	5:58 p.m.	President called Mr. Haldeman	Residence Phone
	6:16 p.m.	6:31 p.m.	Mr. Ehrlichman called President	Residence Phone
	6:44 p.m.	6:47 p.m.	President called Mr. Haldeman	Unknown
	7:26 p.m.	7:30 p.m.	Mr. Ehrlichman called President	Unknown
April 12, 1973	9:17 a.m.	9:55 a.m.	President met with Mr. Ehrlichman	Oval Office
	11:30 a.m.	11:43 a.m.	President met with Mr. Haldeman	Oval Office
	2:30 p.m.	3:45 p.m.	President met with Mr. Ehrlichman	President's EOB Office

<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
Apr. 12, 1973	4:00 p.m.	5:21 p.m.	President met with Mr. Connally	Oval Office
	7:31 p.m.	7:48 p.m.	President called Mr. Colson	Residence Phone
Apr. 11, 1973	11:05 a.m.	11:50 a.m.	President met with Mr. Ehrlichman	Oval Office
	12:34 p.m.	1:20 p.m.	President met with Mr. Ehrlichman	Oval Office
	1:40 p.m.	2:59 p.m.	President met with Messrs. Haldeman, Ziegler, Ehrlichman	President's EOB Office
	3:18 p.m.	4:49 p.m.	President met with Messrs. Haldeman, Ehrlichman, Ziegler	Oval Office
	6:24 p.m.	6:34 p.m.	President called Mr. Ziegler	Camp David Aspen Lodge Phone
	6:43 p.m.	6:45 p.m.	Mr. Ziegler called President	Camp David Aspen Lodge Phone
	6:59 p.m.	7:03 p.m.	Mr. Haldeman called President	Camp David Aspen Lodge Phone
	7:06 p.m.	7:11 p.m.	President called Dr. Kissinger	Camp David Aspen Lodge Phone
	7:14 p.m.	7:26 p.m.	Mr. Ehrlichman called President	Camp David Aspen Lodge Phone

<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
Apr. 11, 1973	7:30 p.m.	7:32 p.m.	Mr. Haldeman called President	Camp David Aspen Lodge Phone
	7:38 p.m.	7:43 p.m.	President called Mr. Ehrlichman	Camp David Aspen Lodge Phone
Apr. 10, 1973	8:16 a.m.	8:31 a.m.	President met with Mr. Haldeman	Oval Office
	10:44 a.m.	11:05 a.m.	President met with Mr. Haldeman	Oval Office
	12:48 p.m.	2:00 p.m.	President met with Mr. Ehrlichman	Oval Office
	5:59 p.m.	6:09 p.m.	President met with Mr. Ehrlichman	President's EOB Office
	6:20 p.m.	7:01 p.m.	President met with Mr. Haldeman	President's EOB Office
Apr. 1, 1973	2:23 p.m.	3:03 p.m.	Mr. Colson called President	San Clemente
	4:55 p.m.	5:01 p.m.	President called Mr. Colson	San Clemente
Mar. 23, 1973	12:44 p.m.	1:02 p.m.	President called Mr. Dean	Key Biscayne
	3:28 p.m.	3:44 p.m.	President called Mr. Dean (Dean in Camp David)	Key Biscayne
Mar. 22, 1973	1:57 p.m.	3:43 p.m.	President met with Messrs. Haldeman, Ehrlichman, Dean, Mitchell	President's EOB Office

<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
Mar. 21, 1973	9:15 a.m.	10:12 a.m.	President met with Mr. Ehrlichman	Unknown
	10:05 a.m.	11:55 a.m.	President met with Messrs. Haldeman, Dean	Unknown
	5:20 p.m.	6:01 p.m.	President met with Messrs. Haldeman, Dean, Ehrlichman, Ziegler, Gen. Scowcroft	Unknown
	7:53 p.m.	8:24 p.m.	President called Mr. Colson	Unknown
Mar. 20, 1973	10:46 a.m.	10:47 a.m.	President called Mr. Dean	Unknown
	10:47 a.m.	12:10 p.m.	President met with Messrs. Haldeman, Ehrlichman	Unknown
	12:59 p.m.	1:00 p.m.	President called Mr. Dean	Unknown
	1:42 p.m.	2:31 p.m.	President met with Messrs. Dean, Moore	Unknown
	7:29 p.m.	7:43 p.m.	President called Mr. Dean	Unknown
Mar. 19, 1973	5:03 p.m.	5:41 p.m.	President met with Messrs. Dean, Moore	President's EOB Office
	8:34 p.m.	8:58 p.m.	President called Mr. Colson	Unknown
	5:43 p.m.	6:10 p.m.	President met with Mr. Ehrlichman	Unknown



<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
Mar. 17, 1973	1:25 p.m.	2:10 p.m.	President met with Mr. Dean	Oval Office
Mar. 16, 1973	10:34 a.m.	11:06 a.m.	President met with Messrs. Dean, Ziegler	Oval Office
	7:53 p.m.	8:12 p.m.	President called Mr. Colson	Unknown
	8:14 p.m.	8:23 p.m.	President called Mr. Dean	Unknown
	3:00 p.m.	4:47 p.m.	President met with Mr. Ehrlichman	President's EOB Office
Mar. 15, 1973	4:36 p.m.	6:24 p.m.	President met with Messrs. Dean, Moore	Oval Office
Mar. 14, 1973	8:55 a.m.	8:59 a.m.	Mr. Dean called President	Unknown
	9:43 a.m.	10:50 a.m.	President met with Messrs. Dean, Kissinger, Ziegler, Moore	President's EOB Office
	12:27 p.m.	12:28 p.m.	President called Mr. Dean	Unknown
	12:47 p.m.	1:30 p.m.	President met with Messrs. Moore, Dean	Unknown
	4:25 p.m.	4:26 p.m.	President called Mr. Dean	Unknown

<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
Mar. 14, 1973	4:34 p.m.	4:36 p.m.	Mr. Dean called President	Unknown
Mar. 13, 1973	12:42 p.m.	2:00 p.m.	President met with Messrs. Dean, Haldeman	Oval Office
	5:45 p.m.	6:29 p.m.	President met with Messrs. Ehrlichman, Haldeman, Ziegler, Dr. Kissinger	Unknown
Mar. 11, 1973	10:47 a.m.	10:57 a.m.	Mr. Ehrlichman called President	Unknown
	4:19 p.m.	4:51 p.m.	President called Mr. Colson	Unknown
Mar. 10, 1973	9:20 a.m.	9:44 a.m.	President called Mr. Dean	Camp David Phone
Mar. 8, 1973	9:51 a.m.	9:54 a.m.	President met with Mr. Dean	Oval Office

<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
Mar. 7, 1973	8:53 AM	9:16 AM	President met with Mr. Dean	Oval Office
Mar. 6, 1973	11:49 AM	12:00 noon	President met with Mr. Dean	Oval Office
	12:48 PM	12:56 PM	President met with Mr. Ehrlichman	unknown
Mar. 1, 1973	9:18 AM	9:46 AM	President met with Mr. Dean	Oval Office
	10:36 AM	10:44 AM	President met with Mr. Dean	Oval Office
	1:06 PM	1:14 PM	President met with Mr. Dean	Oval Office
Feb. 28, 1973	9:12 AM	10:23 AM	President met with Mr. Dean	Oval Office
Feb. 27, 1973	3:55 PM	4:20 PM	President met with Mr. Dean	Oval Office
	5:21 PM	6:35 PM	President met with Messrs. Ehrlichman, Hitt	unknown
Feb. 21, 1973	4:08 PM	4:58 PM	President met with Messrs. Ehrlichman, Haldeman,	unknown
Feb. 14, 1973	10:13 AM	10:49 AM	President met with Mr. Colson	Oval Office
	12:38 AM	1:46 AM	President met with Mr. Haldeman	unknown
Feb. 13, 1973	9:48 AM	10:52 AM	President met with Mr. Colson	Oval Office
Feb. 10, 1973	11:20 AM	1:55 PM	President called Mr. Colson	San Clemente phone
Feb. 8, 1973	1:50 PM	2:15 PM	President met with Mr. Colson	President's BOB Office
Feb. 7, 1973	10:23 AM	11:44 AM	President met with Messrs. Ehrlichman, Haldeman, Ziegler	unknown
	12:45 PM	1:20 PM	President met with Mr. Colson	President's BOB Office

<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
Feb. 6, 1973	2:52 PM	3:37 PM	President met with Mr. Colson, Mr. Bull, Dr. Kissinger	President's EOB Office
Feb. 5, 1973	4:10 PM	4:46 PM	President met with Mr. Colson	President's EOB Office
Feb. 4, 1973	9:54 AM	10:29 AM	President called Mr. Colson	Camp David phone
Feb. 3, 1973	11:05 AM	12:08 PM	President met with Mr. Colson	Oval Office
	1:32 PM	1:57 PM	President met with Mr. Colson	Oval Office

<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
Feb. 2, 1973	9:35 AM	10:33 AM	President met with Mr. Colson, Mr. H.R. Haldeman	Oval Office
Jan. 31, 1973	4:17 PM	4:52 PM	President met with Messrs. Colson, Ehrlichman	Oval Office
Jan. 30, 1973	8:21 PM	8:57 PM	President called Mr. Colson	unknown
	9:55 PM	9:57 PM	President called Mr. Colson	unknown
Jan. 27, 1973	8:51 AM	9:10 AM	President called Mr. Colson	Key Biscayne phone
Jan. 25, 1973	3:31 PM	4:33 PM	President met with Messrs. Colson, H.R. Haldeman, Bull	President's EOB Office
	7:14 PM	7:30 PM	President called Mr. Colson	unknown
Jan. 24, 1973	8:12 AM	8:28 AM	President met with Mr. Colson	Oval Office
	1:49 PM	1:55 PM	President met with Messrs. Colson, Bull	President's EOB Office
	7:17 PM	7:31 PM	President called Mr. Colson	unknown
Jan. 23, 1973	10:49 AM	11:00 AM	President called Mr. Colson	unknown
	11:37 AM	11:48 AM	Mr. Colson called the President	unknown
	1:59 PM	2:30 PM	President met with Mr. Colson	President's EOB Office
	6:22 PM	6:36 PM	President met with Mr. Colson	President's EOB Office
Jan. 22, 1973	3:40 PM	4:35 PM	President met with Mr. Colson	President's EOB Office

<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
Jan. 22, 1973 (continued)	8:47 PM	8:50 PM	President called Mr. Colson	unknown
Jan. 20, 1973	1:04 AM	1:46 AM	President called Mr. Colson	unknown
Jan. 17, 1973	9:34 PM	9:33 PM	President called Mr. Colson	Key Biscayne phone
Jan. 9, 1973	3:09 PM	4:25 PM	President met with Messrs. Colson, Haldeman	President's EOB Office
Jan. 8, 1973	4:05 PM	5:34 PM	President met with Messrs. Ziegler, Colson, Col.- Kennedy	President's EOB Office
Jan. 7, 1973	9:47 AM	10:08 AM	President called Mr. Colson from Camp David	Camp David phone
Jan. 6, 1973	9:46 AM	10:17 AM	President called Mr. Colson	Camp David phone
	12:19 PM	12:39 PM	President called Mr. Colson	Camp David phone
Jan. 5, 1973	12:02 PM	1:02 PM	President met with Mr. Colson	President's EOB Office
	4:55 PM	5:29 PM	President met with Mr. Ehrlichman	unknown
	7:38 PM	7:58 PM	President called Mr. Colson	Camp David phone
Jan. 4, 1973	8:46 AM	8:50 AM	President called Mr. Colson	unknown
	8:53 AM	8:55 AM	President called Mr. Colson	unknown
	1:06 PM	1:46 PM	President met with Mr. Halde- man	unknown

<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
Jan. 4, 1973 (continued)	3:02 PM	5:15 PM	President met with Messrs. Ehrlichman, Haldeman, Collins, Dr. Kissinger	unknown
	5:16 PM	5:50 PM	President met with Mr. Colson	President's EOB Office
	7:06 PM	7:12 PM	President called Mr. Colson	unknown
	8:13 PM	8:34 PM	President called Mr. Colson	unknown
Jan. 3, 1973	8:39 PM	8:59 PM	President called Mr. Colson	unknown
Jan. 2, 1973	9:30 AM	11:20 AM	President met with Mr. Colson	President's EOB Office
	2:45 PM	3:30 PM	President met with Mr. Colson	President's EOB Office
	4:41 PM	6:09 PM	President met with Mr. Colson	Oval Office
	6:33 PM	6:37 PM	President called Mr. Colson	unknown
	9:44 PM	10:00 PM	President called Mr. Colson	unknown
	10:34 PM	10:37 PM	President called Mr. Colson	unknown

<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
Jan. 1, 1973	9:40 a.m.	10:40 a.m.	President met with Mr. Colson	Oval office
	11:20 a.m.	1:10 p.m.	President met with Mr. Colson and Mr. Bull	President's EOB Office
Dec. 31, 1972	11:17 a.m.	11:47 a.m.	President called Mr. Colson	Unknown
	12:24 p.m.	12:41 p.m.	Mr. Colson called the President	Unknown
	1:19 p.m.	1:34 p.m.	President called Mr. Colson	Unknown
	1:57 p.m.	2:06 p.m.	President called Mr. Colson	Unknown
	2:43 p.m.	3:00 p.m.	President called Mr. Colson	Unknown
	7:34 p.m.	7:44 p.m.	President called Mr. Colson	Unknown
	8:00 p.m.	8:02 p.m.	President called Mr. Colson	Unknown
Dec. 30, 1972	2:35 p.m.	2:53 p.m.	President called Mr. Colson	Unknown
	7:06 p.m.	7:13 p.m.	President called Mr. Colson	Unknown
	7:30 p.m.	7:39 p.m.	Mr. Colson called the President	Unknown
Dec. 25, 1972	11:55 a.m.	12:00 noon	President called Mr. Mitchell	Unknown



<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
Dec. 5, 1972	8:26 a.m.	8:27 a.m.	President called Mr. Colson	Unknown
	8:29 a.m.	9:50 a.m.	President met with Mr. Colson, Mr. Haldeman, Col. Kennedy	President's EOB Office
	2:00 p.m.	3:35 p.m.	President met with Messrs. Colson, Haldeman, Ziegler, Gov. Connally	President's EOB Office
	10:05 p.m.	10:34 p.m.	President called Mr. Colson	Camp David Phone
Nov. 30, 1972	7:56 p.m.	8:15 p.m.	President called Mr. Colson	Unknown
Nov. 29, 1972	8:12 p.m.	8:20 p.m.	President called Mr. Colson	Unknown
Nov. 20, 1972	2:05 p.m.	2:21 p.m.	President called Mr. Colson	Camp David Phone
	7:15 p.m.	8:00 p.m.	President had dinner with Messrs. Haldeman, Ehrlichman, Ziegler and Colson	Camp David
	8:00 p.m.	8:15 p.m.	President met with Mr. Colson	Unknown
Nov. 19, 1972	9:35 a.m.	10:45 a.m.	President called Mr. Colson	Unknown
Nov. 15, 1972	5:55 p.m.	6:08 p.m.	President called Mr. Colson	Camp David Phone

<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATON</u>
Nov. 14, 1972	2:40 p.m.	3:08 p.m.	President called Mr. Colson	Camp David Phone
	5:25 p.m.	5:36 p.m.	President called Mr. Colson	Camp David Phone
	7:34 p.m.	7:42 p.m.	President called Mr. Colson	Camp David Phone
Nov. 13, 1972	12:27 p.m.	12:50 p.m.	President called Mr. Colson	Camp David Phone
	5:30 p.m.	7:30 p.m.	President met with Messrs. Colson, Haldeman and Ehrlichman	Camp David
Nov. 6, 1972	8:34 a.m.	9:06 a.m.	President called Mr. Colson	Western White House
	1:00 p.m.	1:02 p.m.	President called Mr. Mitchell	Unknown
	6:56 p.m.	7:14 p.m.	President called Mr. Colson	Western White House
	9:13 p.m.	9:19 p.m.	President called Mr. Colson	Western White House
Oct. 24, 1972	11:59 a.m.	12:32 p.m.	President met with Mr. Haldeman	Unknown
	12:18 p.m.	12:29 p.m.	President called Mr. Colson	Unknown
	12:57 p.m.	1:24 p.m.	President called Mr. Colson	EOB Office Phone
	4:16 p.m.	6:30 p.m.	President met with Messrs. Colson, Connally, Mitchell, MacGregor, Ehrlichman, and Haldeman	EOB Office

<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
Oct. 23, 1972	11:20 a.m.	11:46 a.m.	President met with Mr. Colson	Unknown
Oct. 22, 1972	9:21 a.m.	9:45 a.m.	President called Mr. Colson	Camp David Phone
Oct. 17, 1972	2:10 p.m.	3:00 p.m.	President met with Mr. Colson	Unknown
	4:07 p.m.	6:24 p.m.	President met with Messrs. Mitchell, Haldeman, Connally, MacGregor, Ehrlichman	Oval Office
Oct. 5, 1972	12:26 p.m.	1:35 p.m.	President met with Mr. Colson and Mr. Haldeman	Unknown

<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
Oct. 5, 1972 (cont'd)	3:04 p.m.	4:46 p.m.	President met with Messrs. Mitchell, Haldeman, Ehrlichman, MacGregor, Dole, Harlow	Oval Office
	6:35 p.m.	6:48 p.m.	President called Mr. Colson	Unknown
	7:50 p.m.	8:05 p.m.	President called Mr. Colson	Unknown
Sept. 15, 1972	3:15 p.m.	6:17 p.m.	President met with Messrs. Haldeman, Dean	Unknown
	9:09 p.m.	9:25 p.m.	President called Mr. Colson	Unknown
Sept. 14, 1972	2:50 p.m.	3:40 p.m.	President met with Mr. Colson	President's BOB Office
	7:20 p.m.	7:36 p.m.	President called Mr. Colson	Unknown
Sept. 13, 1972	5:55 p.m.	6:08 p.m.	President called Mr. Colson	Camp David Phone
	6:10 p.m.	6:36 p.m.	President met with Messrs. Haldeman, Mitchell, MacGregor and Gov. Connally	Camp David
Sept. 8, 1972	2:31 p.m.	3:01 p.m.	President met with Mr. Colson	President's BOB Office
	3:00 p.m.	3:40 p.m.	President met with Messrs.. Krogh, Ehrlichman	President's BOB Office
Aug. 29, 1972	8:08 p.m.	8:30 p.m.	President called Mr. Colson	San Clemente
Aug. 28, 1972	1:37 p.m.	1:58 p.m.	President called Mr. Colson	San Clemente
Aug. 27, 1972	12:44 p.m.	1:17 p.m.	President called Mr. Colson	San Clemente
Aug. 25, 1972	7:28 a.m.	8:03 a.m.	President called Mr. Colson	San Clemente

<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
Aug. 25, 1972 (cont'd)	8:17 a.m.	8:25 a.m.	President called John Mitchell	San Clemente
Aug. 14, 1972	9:03 a.m.	10:42 a.m.	President met with Messrs. Mitchell, Haldeman, MacGregor	Oval Office
Aug. 11, 1972	6:14 p.m.	6:35 p.m.	President called Mr. Colson	Unknown
Aug. 10, 1972	8:12 p.m.	8:35 p.m.	President called Mr. Colson	Unknown
Aug. 9, 1972	7:09 p.m.	7:36 p.m.	President called Mr. Colson	Unknown
Aug. 7, 1972	9:04 a.m.	9:32 a.m.	President met with Messrs. Colson, Butterfield	Oval Office
	5:25 p.m.	6:20 p.m.	President met with Mr. Colson	President's EOB Office
July 29, 1972	10:42 a.m.	11:19 a.m.	President called Mr. Colson	Unknown
	1:09 p.m.	1:22 p.m.	President called Mr. Colson	Unknown
	5:49 p.m.	6:09 p.m.	President called Mr. Colson	Unknown
July 28, 1972	12:24 p.m.	12:28 p.m.	President called Mr. Colson	Unknown
	8:44 p.m.	9:01 p.m.	President called Mr. Colson	Unknown
July 21, 1972	2:01 p.m.	3:11 p.m.	President met with Messrs. Mitchell, Haldeman, Agnew	Oval Office
	6:05 p.m.	10:45 p.m.	President met with Messrs. Colson, Connally, Haldeman (dinner)	Camp David
July 16, 1972	7:05 p.m.	9:17 p.m.	President met with Messrs. Ehrlichman, Haldeman, Ziegler, Dr. Kissinger and Gen. Haig	San Clemente

<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
July 11, 1972	8:48 a.m.	9:02 a.m.	President called Mr. Colson	Unknown
	12:43 p.m.	12:49 p.m.	President called Mr. Mitchell	San Clemente
	10:34 p.m.	10:52 p.m.	President called Mr. Colson	Unknown
July 10, 1972	10:10 a.m.	10:35 a.m.	President called Mr. Colson	Unknown
	5:07 p.m.	5:19 p.m.	Mr. Colson called the President	Unknown
	6:43 p.m.	6:53 p.m.	Mr. Colson called the President	Unknown
	8:39 p.m.	9:06 p.m.	President called Mr. Colson	Unknown
	10:43 p.m.	10:59 p.m.	President called Mr. Colson	Unknown
July 7, 1972	8:22 a.m.	9:35 a.m.	President met with Mr. Ehrlichman	San Clemente
	10:30 a.m.	10:50 a.m.	President met with Messrs. Ehrlichman, Ziegler	San Clemente
July 6, 1972	10:11 a.m.	12:06 p.m.	President met with Messrs. Haldeman, Ehrlichman, MacGregor, Malek, Timmons, Ziegler and Dr. Kissinger	San Clemente
	unknown	unknown	President called Mr. Gray	San Clemente
	12:39 p.m.	3:00 p.m.	President met with Messrs. Ehrlichman, Haldeman, Ziegler and Miss Woods	San Clemente
	5:30 p.m.	5:43 p.m.	President called Mr. Colson	Unknown
July 5, 1972	9:36 a.m.	10:32 a.m.	President met with Mr. Ehrlichman and Dr. Kissinger	San Clemente

<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
July 2, 1972	8:13 a.m.	8:46 a.m.	President called Mr. Colson	San Clemente Phone
	9:00 a.m.	9:05 a.m.	President called Mr. Mitchell	San Clemente Phone
July 1, 1972	8:50 a.m.	10:05 a.m.	President met with Mr. Colson, Mr. Haldeman, Mr. Butterfield	Oval Office
	5:13 p.m.	5:36 p.m.	President called Mr. Mitchell	San Clemente Phone
June 30, 1972	8:06 a.m.	8:50 a.m.	President met with Mr. Haldeman	Unknown
	8:50 a.m.	9:05 a.m.	President met with Mr. Haldeman	Unknown
	12:17 p.m.	12:44 p.m.	President met with Messrs. Haldeman, Colson	Unknown
	12:55 p.m.	2:10 p.m.	President met with Messrs. Haldeman, Mitchell	Unknown
	3:24 p.m.	4:22 p.m.	President met with Messrs. Haldeman, Kleindienst	Unknown
	4:30 p.m.	6:16 p.m.	President met with Messrs. Haldeman, MacGregor	Unknown
	7:10 p.m.	7:40 p.m.	President called Mr. Colson	Unknown
June 29, 1972	1:00 p.m.	1:28 p.m.	President called Mr. Colson	Camp David Phone
	3:55 p.m.	4:35 p.m.	President met with Mr. Colson, Dr. Kissinger, Mr. Butterfield	President's EOB Office
	9:57 p.m.	10:02 p.m.	President called Mr. Colson	Unknown
	10:38 p.m.	10:54 p.m.	President called Mr. Colson	Unknown
June 28, 1972	11:16 a.m.	1:55 p.m.	President met with Messrs. Haldeman, Colson	President's EOB Office

<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
June 28, 1972 (cont'd)	4:05 p.m.	4:14 p.m.	President called Mr. Colson	Unknown
	4:31 p.m.	4:38 p.m.	President called Mr. Colson	Unknown
June 27, 1972	3:35 p.m.	4:40 p.m.	President met with Messrs. Haldeman, Colson	President's EOB Office
	9:44 p.m.	10:20 p.m.	President called Mr. Colson	Unknown
June 26, 1972	10:59 a.m.	11:06 a.m.	President met with Mr. Ehrlichman	Unknown
	11:07 a.m.	11:30 a.m.	President called Mr. Colson	Oval Office
	2:23 p.m.	2:24 p.m.	Mr. Colson called President	Unknown
	2:25 p.m.	3:00 p.m.	President called Mr. Colson	President's EOB Office
	3:03 p.m.	3:05 p.m.	President called Mr. Colson	Oval Office
	5:52 p.m.	6:12 p.m.	President called Mr. Colson	Unknown



<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
June 25, 1972	2:29 p.m.	2:50 p.m.	President called Mr. Colson	Camp David Phone
June 24, 1972	9:22 a.m.	9:50 a.m.	President called Mr. Colson	Camp David Phone
	7:12 p.m.	7:34 p.m.	President called Mr. Colson	Camp David Phone
June 23, 1972	10:04 a.m.	10:39 a.m.	President met with Mr. Haldeman and Mr. Ziegler	Oval Office
	1:04 p.m.	1:13 p.m.	President met with Mr. Haldeman	Unknown
	2:20 p.m.	2:45 p.m.	President met with Mr. Haldeman and Mr. Ziegler	EOB Office
June 22, 1972	11:29 a.m.	11:39 a.m.	President called Mr. Colson	Unknown
	4:36 p.m.	5:20 p.m.	President met with Messrs. Haldeman, Ziegler, Colson, Butterfield	Oval Office
	7:45 p.m.	8:11 p.m.	President called Mr. Colson	Unknown
June 21, 1972	9:30 a.m.	10:38 a.m.	President met with Messrs. Haldeman, Colson, Butterfield	Oval Office
	1:24 p.m.	3:11 p.m.	President met with Mr. Haldeman and Mr. Ziegler	Oval Office
	2:11 p.m.	2:15 p.m.	President called Mr. Colson	Unknown
	3:56 p.m.	3:57 p.m.	President called Mr. Colson	Unknown

<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
June 21, 1972 (cont'd)	4:00 p.m.	5:15 p.m.	President called Mr. Colson	President's EOB Office Phone
	7:38 p.m.	7:56 p.m.	President called Mr. Colson	Unknown
June 20, 1972	10:25 a.m.	11:20 a.m.	President met with Mr. Ehrlichman	President's EOB Office
	11:26 a.m.	12:45 a.m.	President met with Mr. Haldeman	EOB Office
	1:27 p.m.	2:10 p.m.	President met with Gen. Haig	President's EOB Office
	1:45 p.m.	1:49 p.m.	President called Mr. MacGregor	President's EOB Phone
	2:16 p.m.	2:17 p.m.	President called Mr. Colson	President's EOB Phone
	2:20 p.m.	3:30 p.m.	President met with Mr. Colson	President's EOB Office
	4:35 p.m.	5:25 p.m.	President met with Mr. Haldeman	President's EOB Office
	6:08 p.m.	6:12 p.m.	President called Mr. Mitchell	<u>Lincoln Sitting Room</u>
	7:52 p.m.	7:59 p.m.	President called Mr. Haldeman	President's EOB Phone
	8:04 p.m.	8:21 p.m.	President called Mr. Colson	President's EOB Phone
	8:42 p.m.	8:50 p.m.	Mr. Haldeman called the President	Unknown
	11:33 p.m.	12:05 a.m.	President called Mr. Colson	Residence Phone

<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
June 19, 1972	9:22 a.m.	9:26 a.m.	President called Mr. Haldeman	Unknown
	9:59 a.m.	10:02 a.m.	President called Mr. Haldeman	Unknown
	10:49 a.m.	11:48 a.m.	President called Mr. Colson	Key Biscayne
	11:50 a.m.	1:05 p.m.	President called Mr. Haldeman	Unknown
	8:52 p.m.	9:47 p.m.	President met with Mr. Haldeman	Spirit of '76 (in Flight)
June 18, 1972	12:01 p.m.	12:19 p.m.	President called Mr. Haldeman	Unknown
	3:00 p.m.	3:31 p.m.	President called Mr. Colson	Key Biscayne
	6:39 p.m.	6:48 p.m.	President called Mr. Colson	Key Biscayne
June 17, 1972	10:58 a.m.	11:02 a.m.	President called Mr. Haldeman	Unknown
April 4, 1972	Unknown	Unknown	President met with Mr. Haldeman (discussion of ITT and confirmation hearings)	Unknown
	9:44 a.m.	10:06 a.m.	President met with Mr. Haldeman	Unknown
	10:48 a.m.	11:45 a.m.	President met with Mr. Haldeman	Unknown
	4:13 p.m.	4:50 p.m.	President met with Mr. Haldeman and Mr. Mitchell	Unknown
	6:03 p.m.	6:18 p.m.	President met with Mr. Haldeman	Unknown
December 22, 1971	3:27 p.m.	4:40 p.m.	President met with Messrs. Ehrlichman, Haldeman, Mitchell and Young	Unknown

<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
Nov. 30, 1971	5:21 p.m.	6:09 p.m.	President met with Mr. Colson and Dr. Kissinger	Unknown
Nov. 20, 1971	8:45 a.m.	10:45 a.m.	President met with Mr. Haldeman, Mr. Colson and Dr. Kissinger	Unknown
Nov. 18, 1971	10:55 a.m.	12:42 p.m.	President met with Mr. Colson, Mr. Haldeman and Dr. Kissinger	Unknown
	3:47 p.m.	3:51 p.m.	President called Mr. Colson	Unknown
	6:56 p.m.	7:07 p.m.	President called Mr. Colson	Unknown
Nov. 15, 1971	7:03 p.m.	7:20 p.m.	President called Mr. Colson	Unknown
Nov. 4, 1971	8:24 a.m.	9:50 a.m.	President met with Mr. Colson, Mr. Haldeman, Dr. Kissinger and Miss Woods	Unknown
	3:47 p.m.	3:52 p.m.	President called Mr. Colson	Unknown
	4:57 p.m.	4:59 p.m.	President called Mr. Colson	Unknown
Oct. 30, 1971	8:54 a.m.	9:58 a.m.	President met with Mr. Haldeman, Mr. Colson and Dr. Kissinger	Unknown
	12:09 p.m.	12:37 p.m.	President met with Messrs. Haldeman, Colson and Ziegler	Unknown
	5:34 p.m.	5:41 p.m.	President called Mr. Colson	Unknown
	6:10 p.m.	6:18 p.m.	President called Mr. Colson	Unknown

<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
Oct. 29, 1971	5:23 p.m.	6:08 p.m.	President met with Mr. Haldeman, Mr. Colson and Dr. Kissinger	Unknown
	6:11 p.m.	6:19 p.m.	President met with Mr. Haldeman, Mr. Colson and Dr. Kissinger	Haldeman's Office
Oct. 27, 1971	5:29 p.m.	6:14 p.m.	President met with Mr. Haldeman, Mr. Colson, Dr. Kissinger and Miss Woods	Unknown
Oct. 22, 1971	5:24 p.m.	6:20 p.m.	President met with Mr. Colson, Miss Woods, Mr. Butterfield and Gen. Haig	Unknown
Oct 5, 1971	3:59 p.m.	4:33 p.m.	President met with Mr. Colson, Mr. Haldeman and Dr. Kissinger and Mr. Butterfield	Unknown
	9:25 p.m.	9:44 p.m.	President called Mr. Colson	Unknown

<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
Sept. 28, 1971	12:04 p. m.	1:35 p. m.	President met with Messrs. Colson, Haldeman and Dr. Kissinger.	(unknown)
	4:55 p. m.	4:57 p. m.	President called Mr. Colson	(unknown)
	6:26 p. m.	6:30 p. m.	President called Mr. Colson	(unknown)
	8:27 p. m.	8:37 p. m.	President called Mr. Colson	(unknown)
Sept. 18, 1971	11:59 a. m.	2:05 p. m.	President met with Messrs. Ziegler, Ehrlichman, Haldeman and Colson.	(unknown)
Sept. 13, 1971	4:36 p. m.	6:40 p. m.	President met with Messrs. Haldeman and Colson.	(unknown)
Sept. 7, 1971	8:33 a. m.	10:35 a. m.	President met with Mr. Ehrlichman	(unknown)
	10:37 a. m.	12:00 p. m.	Present met with Messrs. Haldeman and Colson	(unknown)
	5:32 p. m.	5:43 p. m.	President called Mr. Colson	(unknown)
Sept. 6, 1971	2:14 p. m.	2:26 p. m.	Mr. Colson called the President	(unknown)
Aug. 16, 1971	11:30 a. m.	1:40 p. m.	President met with Messrs. Colson, Haldeman, Ziegler and Miss Woods	(unknown)
	7:52 p. m.	8:16 p. m.	President called Mr. Colson	(unknown)
Aug. 11, 1971	12:59 p. m.	1:43 p. m.	President met with Messrs. Colson, Ziegler, Haldeman and Miss Woods.	(unknown)
Aug. 5, 1971	1:48 p. m.	2:40 p. m.	President met with Messrs. Haldeman and Colson	(unknown)

<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
Aug. 5, 1971 (cont'd)	7:21 p.m.	7:30 p.m.	President called Mr. Colson	(unknown)
Aug. 4, 1971	1:55 p.m.	2:18 p.m.	President met with Mr. Colson	(unknown)
Aug. 3, 1971	10:19 a.m.	10:32 a.m.	President called Mr. Colson	(unknown)
	7:39 p.m.	8:05 p.m.	President called Mr. Colson	(unknown)
July 24, 1971	9:43 a.m.	10:36 a.m.	President met with Messrs. Ehrlichman, Haldeman and Dr. Kissinger	(unknown)
	12:36 p.m.	1:03 p.m.	President met with Messrs. Ehrlichman, Haldeman and Krogh	(unknown)
July 21, 1971	5:20 p.m.	6:19 p.m.	President met with Dr. Kissinger and Messrs. Haldeman and Colson	(unknown)
July 12, 1971	11:00 a.m.	12:22 p.m.	President met with Messrs. Ehrlichman, F. Donald Nixon, Richard C. Nixon, and Robert Mardian	(unknown)
July 7, 1971	7:30 a.m.	7:59 a.m.	President called Mr. Colson	(unknown)
July 5, 1971	10:41 a.m.	10:58 a.m.	President called Mr. Colson	(unknown)
	2:16 p.m.	2:25 p.m.	President called Mr. Colson	(unknown)
July 4, 1971	11:41 a.m.	12:00 noon	President called Mr. Colson	(unknown)
July 3, 1971	4:12 p.m.	4:22 p.m.	President called Mr. Colson	(unknown)
	4:37 p.m.	4:38 p.m.	President called Mr. Colson	(unknown)

<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
July 2, 1971	9:15 a.m.	10:39 a.m.	President met with Haldeman, Colson, Flanigan	Unknown
	4:14 p.m.	4:22 p.m.	President called Mr. Colson	Unknown
July 1, 1971	10:27 a.m.	11:49 a.m.	President met with Messrs. Haldeman, Colson, Ehrlichman, Dr. Kissinger	Unknown
	6:30 p.m.	6:37 p.m.	President called Mr. Colson	Unknown
June 17, 1971	2:42 p.m.	3:04 p.m.	President met with Messrs. Colson, Haldeman, Ziegler	Unknown
June 16, 1971	4:30 p.m.	5:15 p.m.	President met with Messrs. Colson, John M. O'Neill, Melville Stephens, Butterfield, Dr. Kissinger	Unknown
June 15, 1971	3:45 p.m.	4:30 p.m.	President met with Messrs. Ehrlichman, Mitchell, Ziegler	Unknown
June 4, 1971	11:19 a.m.	12:02 p.m.	President met with Mr. Ehrlichman	Unknown
	2:34 p.m.	2:54 p.m.	President called Mr. Colson	Unknown
	8:56 p.m.	9:02 p.m.	President called Mr. Ehrlichman	Unknown
June 3, 1971	9:59 a.m.	10:04 a.m.	President met with Messrs. Ehrlichman, Mitchell, Hoover, and Krogh	Unknown



All meetings or telephone calls between the President and (a) Egil Krogh or (b) David Young, from July 1, 1971, to September 1, 1973;

All meetings or telephone calls between the President and (a) H.R. Haldeman, (b) J.D. Ehrlichman, (c) C.W. Colson, or (d) J. Mitchell from May 1, 1973, through December 19, 1973.

All meetings or telephone calls between the President and G. Gordon Liddy from July 1, 1971, to June 16, 1972.

All meetings or telephone calls that relate directly or indirectly, in whole or in part, to the "Responsiveness Program" or similar program or programs however designated from January 1, 1971, to November 7, 1972.

All meetings or telephone calls between the President and (a) H.R. Haldeman, (b) J.D. Ehrlichman, (c) C.W. Colson, (d) John Mitchell, and/or (e) Dwight Chapin regarding Donald Segretti and his activities from January 1, 1971 through December 19, 1973.

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<u>DATE</u>	<u>FROM</u>	<u>TO</u>	<u>PARTICIPANTS</u>	<u>LOCATION</u>
Apr. 19, 1971	Unknown	Unknown	President called Mr. Kleindienst	Unknown

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## United States Senate

SELECT COMMITTEE ON  
 PRESIDENTIAL CAMPAIGN ACTIVITIES  
 (PURSUANT TO S. RES. 46, 93D CONGRESS)

WASHINGTON, D.C. 20510

TO: Samuel Dash  
 FROM: Ronald D. Rotunda  
 DATE: January 21, 1974  
 SUBJECT: Justifications and Priorities for Subpoenas  
 Issued to President on December 19, 1973

### Part I

Attached is a memorandum discussing in detail those papers and conversation subpoenaed from the President on December 19, 1973, to the extent that the subpoenaed materials relate primarily to the Watergate phase of the Select Committee investigation. The other materials (relating primarily to the investigation of political sabotage and campaign financing) are considered in another memorandum, attached to this memorandum.

The attached memorandum is a brief justification of the conversations subpoenaed; it also recommends a set of priorities among the subpoenas: from "A" (very high priority) to "D" (low priority).

PAPERS TO BE SUBPOENAED**PRIORITY**

B

1. All memoranda, papers, transcripts, or other writings relating to any of the meetings or telephone calls to be produced by the subpoena of tapes and/or other electronic and/or mechanical recordings or reproductions of meetings and telephone calls.

B

2. The actual copy of the daily news summaries from June 1, 1972, to the present, transmitted to President Nixon and upon which he made his own notations, whenever such daily news summaries and notations relate directly or indirectly in whole or in part, to:

B

(a) the break-in and electronic surveillance at the Democratic National Committee Headquarters at the Watergate; and/or

B

(b) any offers of or authorizations to offer executive clemency to Messrs. McCord, Liddy, Hunt, Barker, Martinez, Sturgis, Gonzales, or any members or former members of President Nixon's White House staff; and or

B

(c) any discussions or authorizations of the payments of money to Messrs. Liddy, McCord, Hunt, Barker, Martinez, Sturgis, or Gonzales; and/or

B

(d) any discussions or instructions related to, or involving, any official of the Department of Justice or the FBI relating, in whole or in part, directly or indirectly, to limit or otherwise affect the course of any investigation or prosecution of the events involving the break-in and electronic surveillance at the Democratic National Committee Headquarters at the Watergate and related events prior and subsequent thereto; and/or

B

(e) any discussion or instructions related to, or involving, the Central Intelligence Agency (CIA) (or any official thereof) relating, in whole or in part, directly or indirectly, to any possible involvement by the CIA (or any official thereof) or use of any CIA funds in any financing of or payment of money to Messrs. Liddy, McCord, Hunt, Barker, Martinez, Sturgis, and Gonzales after June 1, 1973; any contacts, communications, meetings,

-2-

or telephone calls between the CIA (or any official thereof) and the Federal Bureau of Investigation (or any official thereof) or the Department of Justice (or any official thereof) related, in whole or in part, directly or indirectly, to any Government investigation of the events involving the break-in and electronic surveillance at the Democratic National Committee Headquarters at the Watergate, including but not limited to any Government investigation of possible Republican campaign contribution which allegedly passed through Mexico, and/or

B (f) any discussion or instructions related to or involving perjury or possible perjury of anyone connected with the investigation of the events involving the break-in and electronic surveillance at the Democratic Committee Headquarters at the Watergate and related events prior and subsequent thereto, including but not limited to the break-in at the office of the psychiatrist of Daniel Ellsberg, and/or

C (g) any discussion or instructions related to or involving "the Responsiveness Program"

TAPES TO BE SUBPENAEDColson Conversation with President NixonPRIORITY

1. Possible Executive Clemency Discussions -- According to Dean testimony (1 Hearings 973-74), Colson told Dean on January 5 that sometime between January 3-5, 1973, he discussed executive clemency with President Nixon. This could have taken place during any or all of the following conversations.

A January 3, 1973, 8:39-8:59 p.m.: President called Colson  
 " January 4, 1973, 8:46-8:50 a.m.: "  
 " January 4, 1973, 8:53-8:55 a.m.: "  
 " January 4, 1973, 5:16-5:50 p.m.: President met with Colson  
 in EOB Office  
 " January 4, 1973, 7:06-7:12 p.m.: President called Colson  
 " January 4, 1973, 8:13-8:34 p.m.: President called Colson  
 " January 5, 1973, 12:02-1:02 p.m.: President met with Colson  
 in EOB Office  
 " January 5, 1973, 7:38-7:58 p.m.: President called Colson  
 from Camp David

2. Presidential Investigative Efforts -- Colson claims (N. Y. Times article, 6/10/73, news file 2345) that during this meeting he urged the President to force Mitchell to admit his role in burglary. He says Nixon's remarks prove he knew no more about the burglary and cover-up than he has publicly admitted.

A February 14, 1973, 10:13-10:49 a.m.: Oval Office meeting

3. Colson and Nixon engaged in a phone call on Dean on the Watergate problem. Newspaper clipping file at p. 2981, NYT, July 2, 1973, at 1 + 17.

A March 21, 1973, 7:53 p.m.-8:24 p.m.: Colson-Nixon phone call

PRIORITYEHRlichman CONVERSATIONS WITH PRESIDENT NIXON

- A 1. Ellsberg Burglary -- According to Ehrlichman, in March of 1973, he had a discussion with the President on the Ellsberg burglary affair and the need for security.  
(Select Committee Tr. 5919-20, July 30, 1973).

Meeting in March, 1973 between Ehrlichman and the President on the Ellsberg Burglary affair.

- A 2. Executive Clemency -- According to Ehrlichman, during July, 1972, Ehrlichman and the President discussed executive clemency and why it should not be discussed in the future as applying to the Watergate defendants, according to Ehrlichman.  
(Select Committee Tr. 5421, July 25, 1973).

Meeting between Ehrlichman and the President regarding Executive Clemency with respect to the Watergate defendants, in July of 1972.

- A 3. CIA -- According to Ehrlichman, on July 6th or 7th, 1972, he and the President had a meeting dealing with the President's concern over a possible relationship between the CIA and the Watergate affair.  
(Select Committee Tr. 5291, July 24, 1973).

Meeting(s) with the President and Ehrlichman on July 6th and/or 7th, 1972, dealing with possible relations between the CIA and the Watergate affair.

- C 4. October 24, 1972 -- Watergate discussion. According to Mitchell, Mitchell, the President, Ehrlichman, Connally, MacGregor, Colson, Haldeman, and Butterfield, had a meeting on October 24, 1972, concerning political activities, Watergate, and the possibility that the President should appoint a Special Commission (with Connally a member) to investigate Watergate.  
(Mitchell Interview of May 10, 1973, at 10).

October 24, 1972  
4:16 - 6:05 P.M.

President, Mitchell,  
Ehrlichman, Connally,  
MacGregor, Colson,  
Haldeman & Butterfield.

-4-

Ehrlichman Conversations with President NixonPRIORITY

5. Possible Executive Clemency -- According to Dean (1 Hearings 973-74), Ehrlichman was involved in discussions of executive clemency with the President around January 3-5, 1973.

A January 4, 1973, 3:02-4:30 p.m. meeting

A January 5, 1973, 4:55-5:29 p.m. meeting

6. According to Ehrlichman, he met with the President on March 30, 1973, at which time the President said that it was evident to him that Dean "was in the thing up to his eyebrows." (DNC Tr. of Ehrlichman Deposition at 154-56).

B March 30, 1973, 12:02-12:18 p.m.: Meeting with Ehrlichman and Ziegler

And any notes on the following meetings which may not have been taped, between Nixon and Ehrlichman alone:

C 3:03-3:10 p.m.: President and Ehrlichman by helicopter to Andrews

C 3:18-5:17p.m.: President met with Ehrlichman in flight

C 4:20-5:17p.m.: President and Ehrlichman met in flight  
(PST)

C 5:33-5:47 p.m.: Manifest-El Toro to San Clemente

7. Ehrlichman Report to the President -- According to Haldeman (Haldeman Interview, June 14, 1973, p. 12), on Saturday, April 14, 1973, Ehrlichman gave the President an outline of his report, developing on a purely hearsay basis a theory of who was involved in Watergate.

White House logs show possible meetings on April 14, 1973:

A 8:55-11:31 a.m.: President and Ehrlichman  
(Haldeman 9:00-11:30)



-5-

PRIORITY

- A 2:24-3:55 p.m.: President with Ehrlichman and Haldeman
- A 5:15-6:45 p.m.: President with Ehrlichman and Haldeman  
also telephone conversation
- A 11:22-11:53 p.m.: President placed local call to  
Ehrlichman

8. On April 15, 1973, Nixon met with Dean who testified that, inter alia, the President told him that he had been joking when he said that he approved the raising of \$1 million for the Watergate defendants; that he had been foolish to have discussed executive clemency with Colson; moreover, Dean told him about his meetings with the U. S. Attorney's Office. On this important date, the President had several meetings with Ehrlichman, both before and after the fateful Dean meeting. At one of these meetings, the destruction by Gray of certain documents was discussed. (See Haldeman DNC Dep., May 25, 1973, at 254-55.)

- A 1:24-3:30 p.m.: President met with Ehrlichman  
(Kleindienst 1:12-2:22)  
(Rebozo 3:25/7-5:26/7)
- A 7:50-9:15 p.m.: President met with Messrs. Ehrlichman  
and Haldeman
- A 10:16-11:15 p.m.: President met with Ehrlichman and  
Haldeman

9. On April 16, 1973, Nixon tried to have Dean sign one of two incriminating statements offering his resignation or a leave of absence. Dean refused. Both before and after this meeting the President talked to Ehrlichman. (Dean Tr. 2375-79)

- A 8:18-8:22 a.m.: President placed local call to  
Ehrlichman
- A 9:50-9:59 a.m.: President met with Ehrlichman and  
Haldeman

-6-

PRIORITY

A 10:50-11:04 a.m.: President met with Ehrlichman and Haldeman

A 12-12:31 p.m.: President met with Ehrlichman and Haldeman. (This meeting noted on Haldeman's book, not on Ehrlichman's logs.)

A 3:27-4:02 p.m.: President met with Ehrlichman (Ziegler 3:35-4:04)

A 9:27-9:49 p.m.: President received local call from Ehrlichman

16. On April 17, 1973 (the day after Dean refused to resign) private Presidential meetings with Haldeman increased dramatically for one day. The Dean problem probably was discussed on April 17.

Ehrlichman

A 12:35-2:20 p.m.: President met with Ehrlichman and Haldeman (Ziegler from 2:10-2:17)

A 2:39-2:40: President placed local call to Ehrlichman

A 3:50-4:35: President met with Ehrlichman and Haldeman

A 6:19-7:14: President met with Ehrlichman and Haldeman alone

-7-

PRIORITY

Liddy, Krogh, and Young

Any Presidential meetings involving Egil Krogh, David Young, or G. Gordon Liddy will very likely shed significant light on the burglary of Ellsberg's psychiatrist's office and the break-in at the Watergate.

A

All meetings or telephone calls between the President and (a) Egil Krogh; (b) David Young; or (c) G. Gordon Liddy from the time the President's tape system was set up through the time it was dismantled.

## Tape of the Tapes

PRIORITY

June 4, 1973, 10-12 hours, ending around 10 p.m. during which the President listed to various Watergate tapes. If he did not use earphones, we could have a tape of important White House tapes. Even if he did use earphones, he may well have made relevant remarks out loud, e.g., "Get me the April 15th tape."

A

June 4, 1973, 10-12 hours, ending around 10 p.m., during which time the President listened to various tapes previously recorded.

Dean Meetings with the PresidentPRIORITY

1. On February 27, 1973, Dean had his first Watergate meeting with the President since September 15, 1972. Nixon told Dean that Dean had been doing an excellent job of dealing with the Watergate matter. There was also a discussion of the Senate Watergate hearings. (3 Hearings 991-92).

B February 27, 1973, 3:55-4:20 p.m.: President and Dean  
Oval Office

2. On April 16, 1973, Dean was asked by the President to sign incriminating letters of resignation (3 Hearings 1017-18).

B April 16, 1973, 10-10:40 a.m.: President and Dean in  
Oval Office

B 4:07-4:35 p.m.: President and Dean in  
EOB Office

B 4:04-4:05 p.m.: President telephoned Dean

## Tapes of Meetings Subpenaed by Cox

PRIORITY

- A 1. Meetings of June 20, 1972 -- Nixon met with Ehrlichman and Haldeman in his Old Executive Office Building Office on June 20, 1972, from 10:25 a.m. until approximately 12:45 p.m.; 10:25-11:20 a.m., Ehrlichman; 11:26-12:45 p.m., Haldeman (subpenaed by Cox).
- A 2. Telephone call of June 20, 1972 -- Nixon talked to Mitchell from 6:08 to 6:12 p.m. (subpenaed by Cox).
- A 3. Meeting of June 30, 1972 -- Nixon met with Haldeman and Mitchell for one hour and 15 minutes in his EOB Office (subpenaed by Cox) from 12:15-2:10 p.m. The next day Mitchell resigned.
- A 4. Meeting of March 22, 1973 -- Nixon met with Dean, Ehrlichman, Haldeman, and Mitchell from 2 p.m. to 3:43 p.m. (subpenaed by Cox).
- A 5. Meeting of April 15, 1973 -- Nixon met with Dean from 9:15-10:12 p.m. (subpenaed by Cox).

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Haldeman Conversations with the PresidentPRIORITY

1. June 17-19, 1972; Haldeman-Nixon contacts in the days immediately following the June 17 burglary, when Watergate was likely to be discussed, were as follows:

- A June 17, 1972, 10:58-11:02 a.m.: President placed long-distance call to Haldeman
- A June 18, 1972, 12:01-12:19 p.m.: President placed local call to Haldeman
- A June 19, 1972, 9:22-9:26 a.m.: President placed local call to Haldeman
- 9:59-10:02 a.m.: President met with Haldeman
- 11:50 a.m.-1:05 p.m.: President met with Haldeman

2. June 23, 1972 -- CIA meetings: Haldeman told the President that Dean had said the FBI was concerned about getting into CIA matters in its investigation of Watergate. The President said to get together with Helms and Walters and find out if the CIA was involved. This CIA meeting occurred on June 23, 1972 (Haldeman interview, June 14, 1973, p. 5).

- A 10:04-10:39 a.m.: Haldeman met with the President in the Oval Office; Ziegler was present from 10:33-10:39.
- A 1:04-1:13 p.m.: Haldeman met with the President in the Oval Office.
- A 2:20-2:45 p.m.: Haldeman met with the President in the EOB; Ziegler was present from 2:40-2:43; this meeting was logged on Haldeman's calendar.

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PRIORITY

4. April 14, 1973 -- Haldeman explained that in a meeting with Haldeman and the President, Ehrlichman presented a theory, based on hearsay evidence, that Mitchell, Magruder, and Dean were involved. The President said to set up a meeting with these three and to tell them that they were not serving the President if they were not telling the truth. Haldeman and Ehrlichman couldn't reach Dean, were told by Mitchell that his conscience was clear, and heard from Magruder that he had just told the whole story to the U. S. Attorney. Haldeman and Ehrlichman returned to the President's office and told him this. The President expressed concern (Haldeman interview, June 14, 1973, p.12).

- A 9-11:30 a.m.: Haldeman met with the President.  
Ehrlichman was present from 8:55-11:31.
- A 2:24-3:55 p.m.: Haldeman and Ehrlichman met with  
the President.
- A 5:15-6:45 p.m.: Haldeman and Ehrlichman met with  
the President.

5. April 15, 1973 -- On the same day that the meeting on executive clemency occurred between Dean and Nixon (the tape of which is missing), the President met several times with Haldeman and Ehrlichman. One meeting took place late at night immediately after the Dean meeting. It is extremely likely that the President talked to Haldeman and Ehrlichman about what he would say or had said to Dean on that important day.

- A 7:50-9:15 p.m.: Haldeman and Ehrlichman met with  
the President
- A 10:16-11:15 p.m.: "
- A 3:27-3:44 p.m.: President placed a local call  
to Haldeman



-13-

PRIORITY

6. April 16, 1973 -- The day after the important April 15th meeting with Dean, the President asked Dean to sign two incriminating resignation letters (Dean Tr. 2375-79). The President met with Haldeman and Ehrlichman several times that day (see Ehrlichman section). The President made a phone call to Haldeman alone, a call which may well be important.

A 12:08-12:23 a.m.: President placed local call to Haldeman

7. April 17, 1973 -- On the day after Dean refused to resign, private Presidential meetings with Ehrlichman increased dramatically for one day. The Dean problem probably was discussed on April 17.

## Haldeman log

A 9:47-9:59 a.m.: President met with Haldeman

A 12:35-2:20 p.m.: President met with Haldeman and Ehrlichman  
(Ziegler 2:10-2:17)

A 3:50-4:35 p.m.: President met with Haldeman and Ehrlichman

A 6:19-7:14 p.m.: President met with Haldeman and Ehrlichman alone

Haldeman resigned from his White House position on April 30, 1973, under charges of being implicated in the Watergate conspiracy and subject to possible indictment. Yet after that resignation under fire, he still has had private meetings with the President.

A+ All meetings or phone calls only between Haldeman and the President alone from April 30, 1973, and the time the White House taping system was dismantled.

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PRIORITYMITCHELL CONVERSATIONS WITH PRESIDENT NIXON

The day before Mitchell officially resigned, the President had a series of meetings and phone calls with Haldeman, Colson, Mitchell, Kleindienst, MacGregor and Colson. Given the individuals consulted by the President at great length, it would be extremely unlikely that Mitchell's resignation and the Watergate affair was not discussed.

June 30, 1972Place

A	8:06 a.m.	8:50 a.m.	Pres. met with Haldeman	Unknown
A	8:50 a.m.	9:05 a.m.	Pres. met with Haldeman	"
A	12:17 p.m.	12:44 p.m.	Pres. met with Messrs. Haldeman, Colson	"
A	12:55 p.m.	2:10 p.m.	Pres. met with Messrs. Haldeman, Mitchell	"
A	3:24 p.m.	4:22 p.m.	Pres. met with Messrs. Haldeman, Kleindienst	"
A	4:30 p.m.	6:16 p.m.	Pres. met with Messrs. Haldeman, MacGregor	"
A	7:10 p.m.	7:40 p.m.	Pres. called Mr. Colson	"

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## United States Senate

SELECT COMMITTEE ON  
 PRESIDENTIAL CAMPAIGN ACTIVITIES  
 (PURSUANT TO S. RES. 44, 82D CONGRESS)

WASHINGTON, D.C. 20510

# JUSTIFICATIONS AND PRIORITIES FOR SUBPOENAED PRESIDENTIAL CONVERSATIONS

## Part II

1971

4/10/71

On April 19, 1971, during a meeting with Ehrlichman and Schultz on antitrust policy, the President was informed by Ehrlichman that the Justice Department was proceeding with an appeal on the ITT case. The President called Attorney General Kleindienst during the meeting, and told him not to appeal the case. (Presidential White Paper)

Priority: A

6/3/71

The President's meeting with Ehrlichman, Mitchell, Hoover, and Knapp was very likely to discuss problems of detecting leaks, the maintenance of national security wiretaps, and possibly the custody of national security wiretap logs which Sullivan removed and gave to Ehrlichman. According to Hunt, the FBI stopped "black bag capability" about this time.

Priority: C

6/4/71

All these conversations are likely to involve follow-up to the 5/3/71 meeting, including discussion of leaks and national security wiretaps. The ITT case proposed settlement was also being discussed during this period, leading up to Kolar's memo of June 17, 1971 outlining the proposed terms. Ehrlichman would have been involved in all ITT settlement discussions with the President.

Priority: D

6/15-  
6/17/71

On 6/13/71 the Pentagon Papers were published, and the President has indicated (5/27/72) that it was during the following week that he approved the creation of a special investigations unit. Discussions among the President, Colson, Ehrlichman, Haldeman, Ziegler and Kissinger may pertain at least in part to the need for a Plumbers Unit and to the anticipated White House response to the publication of the Pentagon Papers. (Note that on June 17 the meeting with the President ends at 3:04 pm and that Ehrlichman, Moore, Haldeman, Kissinger, Dean, Ziegler and MacGregor meet again at 6:00 p.m.)

Priority: B+

6/28-  
7/1/71

On June 28 Ellsberg surrendered to authorities in Boston.

On June 30, Klein writes to Haldeman setting forth the arrangement for \$400,000 in convention support from ITT. Copies of this memo went to Mitchell et al; the President may have discussed it with Colson.

On July 1, Young is detailed to the Plumbers Unit, and Hunt is interviewed for a job. Conversation that day between Hunt and Colson expresses Colson's hope that Ellsberg can be gotten into a "helluva situation" that will discredit the whole New Left. Colson asks if this could be turned into a major public case. (Exhibit 118)

At this time, Colson received a copy of the Haldeman to Dean memo instructing the counsel to look information on O'Brien's relationship with Howard Hughes but to be careful to keep Rebozo and Bennett out of it.

Priority: B (meeting)  
C (phone)

Page 2

7/2-  
7/5/71

Discussions in this period were likely to have dealt with the emerging Plumbers' group and how to deal with Ellsberg. On 7/2/71 a memo from Colson to Haldeman regarding Howard Hunt discusses the value of Hunt, and the significance of his background. The memo concludes "needless to say, I did not even approach what we had been talking about, but merely repeated out his own ideas." (Exhibit 148)  
Priority: C

7/1/71

At Hunt's request, Ehrlichman calls General Cushman and requests assistance from the CIA. Hunt at this time needed a disguise for the Clifton White interaction. Colson was aware of this activity.  
Priority: B

7/12/71

F. Donald Nixon was such a persistent source of difficulty for the White House that the President had his phone tapped (apparently the year before); according to testimony from at least four witnesses (Walters, Ladd, Mitchell, Belmont) Nixon would be periodically warned to stay out of trouble. Ehrlichman, for a time, had the assignment of keeping his eye on F. Donald and his sons.  
Priority: C

7/21-  
7/24/71

On 7/22/71, Hunt visited General Cushman to get a disguise, false documentation, etc.

Ehrlichman says the President authorized the special investigation unit on July 24, 1971. Krogh attended the second meeting on 7/24/71; it is likely that both meetings relate to approval of the "Plumbers" and contain their marching orders.

A series of meetings between the President, Colson and Haldeman begins on 7/21/71. Since one of the major priorities held by Kissinger and Colson was the Ellsberg matter, it is likely that these periodic meetings relate to Plumbers' activities.  
Priority: A

8/3-  
8/5/71

On 7/28/71 Hunt writes to Colson on the "neutralization of Ellsberg" including an operation plan aimed at destroying Ellsberg's public image. On August 3, 1971 Krogh and Young write Colson referring to this memo. (Exhibit 150)

August 3-5 was also the period during which Jack Anderson sought confirmation for his 8/6/71 story that Danner had delivered \$100,000 to Rebozo.  
Priority: B

8/11-  
8/16/71

On August 11, 1971 Krogh and Young wrote to Ehrlichman asking for permission to conduct a "covert operation" on Fielding's office. (Exhibit 90) It is reasonable to suggest that meetings on August 11 and August 15 dealt partially with the use of materials to be developed in "Hunt/Liddy special project No. 1."

Ellsberg pled innocent on August 15, 1971.

Select Committee exhibit 1.8 is an August 16, 1971 memo from Dean to Haldeman, Ehrlichman and others at the White House. The memo deals with the problem of handling political enemies and the use of the federal machinery against such "enemies." (Dean-Tr. 2597)

Page 3

In a September 9 memo from Colson to Dean, Colson refers to designating "those to whom I would give top priority." (Exhibit 49)  
Priority: B.

9/6-  
9/11/71

This is immediately after the Ellsberg breakdown and Hunt's return to Washington.

Priority: A

9/12/71

David Young's notes appear to reflect a lengthy discussion with Ehrlichman on 9/12/71 regarding what papers might be declassified from previous administrations to shift some of the heat from Viet Nam to Cuba, Lebanon and Korea; it seems reasonable to assume that the potential consequences of such declassification were discussed by Colson with the President the next day. Also note that Colson had just recommended the limiting of the Enemies List to 20 names. (Dean testimony)

Priority: D

9/18/71

Young's notes reveal that from 9/18 through 9/21 there were extensive top level discussions about newsmen receiving materials from former aides; it is reasonable to assume that Ehrlichman, Colson and Ziegler may have discussed who should be whisked up with Malcomson and the President.

Priority: D

9/28/71

Another of the meetings between the President, Colson and Kissinger occur on this date, followed by several calls probably dealing with the same subject.

On 9/28/71, Liddy was introduced to Mitchell in preparation for his move to OPR.

Priority: C

10/5/71

Another President, Colson, Kissinger meeting; Hunt worked on forged State Department cables during this month.

Special phone billed to Casper was installed in Hunt's office at about this time.

Priority: C

10/22/71

President, Colson, Haig meeting; Haig presumably sitting in for Kissinger. Hunt prepared false State Dept. cables this month.

Priority: C

10/27/71

President, Colson, Kissinger meeting; Hunt prepared false State Dept. cables this month.

Priority: C

10/29/71

President, Colson, Kissinger meetings; Hunt prepared false State Dept. cables this month.

Priority: C

10/30/71

President, Colson, Kissinger meetings; Hunt prepared false State Dept. cables this month.

Priority: C

11/4/71

President, Colson, Kissinger meetings; this was the month in which Hunt was instructed to give falsified cables to Conien

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before his NBC interview.

A second Ellsberg profile was prepared by the CIA during November.

On November 4, 1971, Strachan attended a meeting with Haldeman, Mitchell and Magruder at which Operation Sandkedge was discussed. (Strachan exec. session 27; HSH by Int: 4)  
Priority: B

11/15/71

This was the approximate time of the first Hunt/Winter meeting; Colson may have been advised of it by either Hunt or Bennett. Gemstone planning also begins at this time.  
Priority: D

11/18/71

President, Colson, Kissinger meetings; Hunt instructed to give falsified cables to Condon during this month.  
Priority: C

11/20/71

President, Colson, Kissinger meetings: Hunt was instructed to give falsified cables to Condon during this month. Note that the bombing of North Viet Nam began 11/21/71; this meeting may also relate to that.  
Priority: D

11/30/71

President, Colson, Kissinger Meeting.  
Priority: C

12/22/71

Hunt was recruiting heavily for Gemstone at this time. On 12/17/71 Strachan prepared a talking paper for a meeting between Haldeman and Mitchell on political intelligence, including a discussion of Liddy's role (note that Young was original choice for Liddy's job); it is also possible that Locke, including surveillance of Kissinger, may have been discussed.  
Priority: B

4/4/72

Haldeman has testified that on April 4 he discussed INT with the President (5 days after the Colson memo). The period is also important; this was the day of the Wisconsin Primary, it was in the midst of campaign intelligence planning, and at the high point of pre-April 7, 1972, campaign donations. Note that the Vesco contribution was received shortly after this date. (The meeting with Mitchell is the most important.)  
Priority: A

6/17-

6/19/72

These were the President's first conversations with Haldeman and Colson following the Watergate breakin. Note that prior to and after Colson's June 19 10:49 to 11:48 call, Colson was involved in discussions relating to Howard Hunt. (It is unlikely that any tapes of these conversations exist as the President was in Key Biscayne at the time.)  
Priority: A

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6/19- On June 19, less than 48 hours after the Watergate  
6/20/72 breakin, a series of significant meetings took place.

Strachan met Haldeman and showed him "political matters" memo mentioning an intelligence gathering system and "Cedar Chair two". SNC (Strachan---TR:4994)

Ehrlichman called and subsequently met with John Dean, instructing him to investigate the affair; Ehrlichman and Dean later met with Colson at which time Ehrlichman ordered Dean to phone Hunt and have him leave the country. Ehrlichman later changed his mind and had this order rescinded.

At this meeting, Dean was instructed to open and examine Hunt's safe; and also to determine what Hunt's status as a White House employee remained. (Dean---TR:2172-73)

Mitchell, LaRue and Waddan returned from California and went to Mitchell's home, where they met with Strachan, Sloan, Liddy, Magruder and Dean. Here, according to Dean, the first steps of a "cover up" were begun. (Dean---TR:2767-69)

On June 19 or June 20, Dean contacted both Kleindienst and Petersen about the Watergate investigation, relaying to Ehrlichman his impression that Petersen would pursue his investigation fairly without following a wide open inquiry into the White House. (Dean---TR:2177-80)

On the 20th, Ehrlichman, Haldeman, Mitchell, Dean and Kleindienst met regarding the investigation. (Ehrlichman---TR:5923-24) The same day, Dean informed Ehrlichman of the contents of Hunt's safe, indicating that politically sensitive materials were among the contents; Ehrlichman advised Dean to "deep six" such items. (Dean---3:938)

With reference to the meeting between the President and General Haig on June 20th at 1:27 P.M., it should be noted that Haig was involved in and aware of the original national security activities of the plumbers; it is likely this meeting dealt with related matters and the involvement of Hunt in both plumber and Watergate activity. It should also be noted that, during his meeting with Haig, the President placed a phone call to MacGregor at 1:45.  
Priority: A

6/21- During this period events and significant meetings  
7/2/72 related to the Watergate affair:



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On June 21, Dean and Gray met regarding the FBI investigation and the uncovering of the DeHillan checks in Barkers bank account. The following day, Gray related to Dean his theories on the case, including the possibility of CIA involvement. On June 22 or June 23, Dean informed Haldeman of this possibility.

On June 23, 1972, Haldeman reported to Nixon; Nixon directed that Haldeman and Ehrlichman meet with Helms and Walters. He was concerned that the FBI investigation not compromise other CIA activities.

At that meeting, Walters recalls that Haldeman used the expression "It was the President's wish" in instructing him to meet with (FBI director) Gray. Haldeman has admitted that he probably did invoke the President's name. (2nd Haldeman Int.)

On June 22, the FBI interviewed Colson, followed by interviews with other campaign and White House personnel. The FBI interview with Chennault, sought in late June, was particularly sensitive (Chennault could compromise the plumbers activities; on July 2, she was joined in London by Fielding who picked her up and coached her on the upcoming FBI interrogation.)

On June 23, Ehrlichman was visited by Hugh Sloan, Jr., the campaign Treasurer. Sloan told Ehrlichman about his apprehensions regarding the very recent Watergate arrests. Sloan got as far as expressing his concern that CRP might be connected with the Watergate situation when Ehrlichman stopped him and said that Ehrlichman did not want to know the details. (TR:1339-41; 1446-48)

Dean, on June 26, discussed with Walters the use of the CIA in curtailing the FBI investigation into the Mexican bank checks aspect of the Watergate investigation and in the use of CIA funds to provide support for the Watergate defendants. Walters refused to intervene except on orders from Nixon. Dean informed Ehrlichman of this discussion, and was directed to attempt to convince Walters of the necessity for CIA intervention. (TR:2202-05)

On June 27, 1972, Gray called Helms and arranged a meeting for June 28 at 2:30 P.M. Gray at that time asked Helms if there was any CIA interest in Mr. Ogarrio. About an hour later Helms called, confirmed the meeting, and said that there was no CIA interest in Ogarrio. The next day, Ehrlichman called Gray in the morning and said,

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"You cancel your meeting with Helms and Walters today. It is not necessary." (McClellan committee TR:138-39)

On June 28, after it became apparent that there would be no assistance for the Watergate defendants from the CIA, Dean met with Mitchell, LaRue, and Mardian about the need for support money in exchange for the silence of the men in jail. Haldeman and Ehrlichman approved the use of Herb Kalmbach to raise such funds. On June 29, Dean met Kalmbach, told him what he knew, and indicated that Haldeman, Ehrlichman, and Mitchell wanted him to raise money for the apprehended burglars. Kalmbach later confirmed this with Ehrlichman. (Dean---3:949-51) Within a week, Kalmbach had returned with money which he transferred to Tony Ulasewicz. A meeting was held at that time between LaRue and Kalmbach to discuss the details of who was to receive how much.

On June 28, after a discussion with Ehrlichman, Dean gave Gray the politically sensitive materials from Hunt's case.

At a meeting with President Nixon on June 30, Clark MacGregor was asked to take over as head of the Committee to Reelect the President. Mitchell resigned on July 1; his conversations with the President on June 30 and July 1 and 2 probably relate to his resignation, grounds for and against it, and its relation to the Watergate break in.  
Priority: A

7/72 (NOTE: According to both Ehrlichman and the President, in July the two discussed executive clemency and why it should not be discussed in the future as applying to the Watergate defendants. (Ehrlichman---TR:5421; President---8/15/73 statement)).

7/5/72 At 9:36 A.M. the President met with Dr. Kissinger and Mr. Ehrlichman; matters of mutual concern probably included the national security considerations related to the Watergate break-in and burglars.  
Priority: B

7/6/72 On July 6, at 10:04 A.M., FBI Director Gray met General Walters, who told Gray there was no reason why Ogarrio and Dahlberg should not be interviewed. A discussion followed

Page 3

that Nixon should be advised that the FBI, the CIA, and that Nixon himself were victimized by the White House staff. At 10:51 A.M., Gray telephoned MacGregor, telling him that he and Walters were unhappy over the White House confusion and its indifference to the FBI and the CIA. Gray indicated this could injure both organizations and Nixon, asking MacGregor to relay his feelings to the President. At 11:28 A.M., Nixon telephoned Gray to congratulate him on the FBI's role in dealing with the hijacking in San Francisco. Gray told Nixon that he wished to bring to the President's attention Gray's and Walters' feeling that people on Nixon's staff were trying to injure Nixon through the use of the CIA and FBI. Nixon told him "Pat, you continue to conduct your aggressive and thorough investigation." (Gray let:3-4)

Throughout the remainder of 1972, a series of payments were made to the Watergate defendants. On this date, \$32,000 was deposited in the account of Hogan and Hartson for Howard Hunt.

Priority: A

7/7/72 According to Ehrlichman, on July 6 or 7, 1972, he and the President had a meeting dealing with the President's concern over possible relationships between the CIA and the Watergate affair. (Ehrlichman---TR:5291)  
Priority: A

7/7- Evidencing a continuing concern on the part of Charles  
7/11/72 Colson with his relationship to Howard Hunt, Colson sent a memo to John Dean on July 7 indicating his lack of knowledge as to why Howard Hunt's office phone number would be listed as Colson's extension. Note that in a memo from General Walters to FBI Director Gray on the same date, Walters indicates that Howard Hunt was provided with false identification and devices in July and August of 1971.

Note also that several days later, on July 13, Colson prepared a memo to Clark MacGregor on Democratic charges against Nixon, with suggestions for counterattacks on McGovern's positions. (CRP archives 730090380-381) It is probable these and other Watergate related matters were considered in the President's conversations with Mr. Colson.  
Priority: A

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- 7/16/72      Given the participants in the July 16 meeting, it is likely to have related to the necessity and means of keeping the plumbers' existence and activities a secret and out of the press.  
Priority: C
- 7/21/72      On July 21, the President met with Mitchell, Haldeman, and Agnew; a likely topic of conversation would have been ITT, one of the few areas of mutual concern, or general campaign activities.  
Priority: A  
At the dinner meeting on the same date, it is likely the political implications of Watergate were discussed.  
Priority: D
- 7/28-  
7/29/72      About ten days into July, 1972, Kalmbach became concerned about his raising money and distributing it to the defendants. He decided to meet with Ehrlichman to discuss the matter. Kalmbach met with Ehrlichman on July 26, 1972, at which time Ehrlichman told Kalmbach that he was aware of Kalmbach's assignments, that Dean had the authority to order the assignment and that the whole operation was proper.  
If the President were aware of such activities, particularly as they related to Howard Hunt, it is likely he would have discussed them with Charles Colson.  
Priority: C
- 8/7-  
8/11/72      During this period Kalmbach was keeping Ehrlichman appraised of his progress in raising funds for the Watergate defendants. Through July and August, Mrs. Hunt has indicated she received several payments for distribution and deposit. As Hunt was the principal beneficiary of these payments, it is possible they were discussed by the President and Colson.  
Priority: B
- 8/14/72      During the period of the convention, a "plot was hatched" to have MacGregor make Watergate disclosures while the President was in Hawaii. (Exhibit 107)  
Priority: A
- 8/25-  
8/29/72      Dean has testified that as early as mid-August the White House had learned that an investigation was being conducted by the House Banking Committee into aspects of

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the Watergate break in. On 8/25 staff investigators came to the Republican National Convention to interview Stans, who they finally spoke with on 8/30.

Stans was scheduled to appear on September 14 before the Committee; prior to this, discussions were held with Petersen and Mitchell about the problems of such an appearance. Stans did not appear on the grounds that it would be detrimental to the criminal investigation proceeding. (Dean 3:954-60)

According to Dean, as demands for money by the Watergate defendants increased through July and August, discussions were held about using \$350,000 of pre-1972 funds for payments. (As the existence of such a fund represented a potential Campaign Act violation for Haldeman, Colson, and Howard, consideration was also given to how it might legally be disposed of.)

During the latter part of August, pressure was increased when Hunt sent Colson a letter, which he turned over to John Dean. At that time, Colson asked his secretary, Joan Hall, to contact Hunt and deliver a reassuring message on his behalf. (Dean 3:967-968; Joan Hall affidavit)

(NOTE: On August 29 the President announced "Dean's findings" that no one then employed at the White House or in the administration was involved in the Watergate incident.)  
Priority: A

9/8/72

On September 8, the President met with Charles Colson immediately followed by John Ehrlichman and Egil Krogh. It can be anticipated that his conversations dealt at least in part with the White House plumbers.  
Priority: B+

9/13-

9/14/72

Immediately prior to this period, Dean had received a Presidential request from both Haldeman and Colson, ordering a series of lawsuits be initiated to counteract the DNC civil suits.

On 9/11 Dean submitted to Haldeman a memo detailing these potential suits; he later saw the memo had been initialed with a "P" that indicated review by the President. (Dean--- 3:956)

At a cabinet meeting on 9/12, Kleindienst stated that the investigation of the Watergate was the most intensive effort since the assassination of JFK. (President's 8/15/73 statement)

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It should also be noted that the indictments were expected to be handed down on September 15; this was probably a topic of considerable concern.  
Priority: A

9/15/72 On 9/15/72, indictments for the seven Watergate burglars were handed down. Later that day the President met with John Dean and H. R. Haldeman, and according to Dean, the President congratulated him on doing a good job and indicated that he was "pleased the case had stopped with Liddy." They discussed the criminal cases and civil cases and the potential hearings before the Pattman committee. At one point in the conversation, Dean recalls the President telling him to keep a good list of the press people giving the administration trouble, so they could make life difficult for them after the election. The conversation also touched on the use of the Internal Revenue Service to attack administration enemies. (Dean 3:957-59)

(NOTE: On September 19, four days later, a memo from Dorothy Hunt to William Bittman indicates that she had received a call from "Mr. Rivers" (Anthony Ulasewicz) and arranged to pick up \$53,500 from him.)  
Priority: A

10/5/72 On October 3, two days previously, a vote for subpoena power by the House Banking and Currency Committee was defeated after a major lobbying effort by the Administration. During this period, John Dean received a memo from Ehrlichman indicating that Herb Kalmbach was thinking ahead to the possibility of the matter of privilege being raised, and had suggested there should be a written retainer arrangement in existence in advance.  
Priority: B

10/17/72 The Washington Post reported on 10/15/72 that Donald Segretti had named Dwight Chapin as one of his contacts. This was followed by a 10/23/72 Time magazine report that Segretti had been hired by Chapin and Strachan and paid by Kalmbach; the report also indicated the FBI had begun its probe of Segretti because of contacts and phone calls with Howard Hunt.

NOTE: Records of Hogan and Hartson indicate a deposit of \$20,000 was made to the account of Howard Hunt four days before, on October 13.  
Priority: B

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10/22- Mrs. Hunt called Joan Hall on 10/22, complaining that commitments had been made to the Watergate defendants that had not been met. Mrs. Hunt indicated that she would call again on 10/24. This information, in addition to being relayed to Charles Colson, was passed on to John Dean. Priority: A

10/24/72 According to Mitchell, he, the President, Ehrlichman, Connally, MacGregor, Colson, Waldeman, and Butterfield had a meeting on 10/24/72 concerning political activities, Watergate, and the possibility that the President should appoint a special commission (with Connally a member) to investigate Watergate. (Mitchell int:5/10/73 p. 10) Priority: A

11/6- (MEMO: During November, Robert Vacco sent a memo to Donald Nixon threatening the disclosure of cash contributions unless legal proceedings against ICC and IOS were dropped. Mitchell learned of this memo, and met with Stans on November 5, to discuss changes in the SEC complaint. (SEC indictment))

On 11/10, Dean met with Segretti in California, recording their conversation. On 11/12, at the request of Ehrlichman's assistant, Dean flew to Florida and played the taped interview for Waldeman and Ehrlichman.

During this period, Mrs. Hunt made several phone calls to Colson's secretary, Joan Hall, discussing the need for money so that Hall might pass it on to Colson and get something done about it. Also during this time, Howard Hunt contacted Charles Colson directly and asked Colson if he would be willing to talk to Hunt's attorney. At this time, Hunt also indicated that financial commitments were not being met, that money was necessary, and that now that the election was over someone should be concentrating on cleaning these problems up. (Exhibit 152)

At a meeting with Haldeman and Ehrlichman on 11/15, Dean played a tape of the previous conversation between Hunt and Colson and informed them of new and increasing demands for money being transmitted from Hunt's lawyer to Mr. O'Brien. Dean then flew to New York and met with John Mitchell, again playing the tape and relating the demands. (Dean--3:968-970)

Priority: A

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11/19- In late November, Haldeman told Dean the President  
 11/30/72 wished to get rid of Watergate and related matters by  
 laying them open; when Dean recounted his information on  
 the affair Haldeman agreed that that did not appear to be  
 a viable option. Haldeman then asked Dean to prepare a  
 written report, including a new report on the Magallan  
 matter. On 12/5, Dean submitted such a draft to Haldeman.  
 (Dean---3:267)

During this period, Mrs. Hunt told James McCord that  
 M. Howard Hunt had dictated a letter which threatened to  
 "blow the White House out of the water."

Note that Charles Colson tendered his resignation to  
 the President on December 2; conversations on November 29  
 and 30 may have related to that.

Ref: A (11/29-11/30); B (11/12-11/20)

12/1- Colson claims he discussed the cover-up with the Pres-  
 12/31/72 ident during this period; Hunt began to put on increased  
 pressure for support and funds; White House sources indicate  
the President is most worried about tapes from this period.  
 Priority: A

12/5/72 On December 5, Dean furnished Haldeman with a draft of  
 a public statement on Watergate. Between December 5 and 13,  
 Haldeman gave it to Ehrlichman who in turn gave it to  
 Zeigler. On 12/13 Haldeman, Dean, Moore and Zeigler discussed  
 the proposed statement and decided that nothing should be  
 made public. (TR:2253-55; 2674-75)  
 Priority: A

(12/19/72) (NOTE: On December 19, Charles Colson left the White  
 House. Note that, following this, Colson had no routine  
 responsibilities or reporting duties to fulfill; contacts  
 with the President continued to be frequent and extended,  
 and may be assumed to have dealt with the issues and items  
 most important to the President.)

12/25- McCord has testified that, during the month of Decem-  
 12/30/72 ber, the Watergate defendants were subject to intensive  
 pressure, urging them to falsely claim for purposes of  
 defense that Watergate was a CIA operation. McCord stated  
 that on 12/21 and 12/26 he was contacted by Bittman (through  
 Alch) with such instructions. Further, Mitchell has  
 testified that between 12/20 and 1/9, he had learned that  
 Dean had instructed Caulfield to contact McCord.  
 Priority: A



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12/30/72- During the week of December 25, McCord wrote a letter  
1/3/73 to Caulfield, warning that, "if attempts to persuade the  
Watergate defendants to blame the CIA for the break in did  
not come, "every tree in the forest will fall".  
(Exhibit 34-29)

On 12/31, Hunt wrote to Colson, asking that Colson  
speak with Hunt's attorney, Bittman; the letter also asks  
Colson to realize the reasons for Hunt's guilty plea. In  
a 1/2/73 memo to Dean, with a copy of that letter attached,  
Colson asks, "Now what the hell do I do?" (Exhibit 34-29)  
Priority: A

1/3- According to Dean's testimony, Ehrlichman and Colson  
1/8/73 were involved in discussions of executive clemency with the  
President between January 3 and 5.

Colson met with Bittman on January 3, 1973. On January 5,  
Colson met with Dean and Ehrlichman indicating he had  
spoken with Bittman and given him general assurances of  
clemency. Colson had further told Bittman, "A year is a  
long time." (Dean---TR:2270-71)

On January 6, Dean called Liddy to explain why Liddy  
had not been called by Krogh; Liddy at that time said he  
hoped there would be money forthcoming for his lawyer.  
(Dean statement)

Priority: A

1/8- Colson discusses executive clemency.

1/17/73 McCord is contacted by Bittman on January 8. On the  
same day, and again on the 12th, 14th and 15th, Caulfield  
spoke with McCord about a guilty plea; Caulfield inferred  
interest and concern in "high places." (McCord 5/18/73  
statement)

On January 11, Hunt pleaded guilty in District Court.  
Following this, on January 15, Barker, Sturgis, Gonzalez,  
and Martinez plead guilty as well.

Priority: A

1/20- On 1/19/73, in response to demands on the part of Hunt  
1/24/73 that financial commitments be met, Kalmbach was again asked  
to raise money for the Watergate burglars. Kalmbach refused  
to do so. (Kalmbach testimony)

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During this period Caulfield brought to Dean McCord's attention regarding McCord intercepted phone calls to foreign embassies. (Dean statement)

Hunt deposited \$24,000 to his account on 1/24/73.

Priority: A

1/25-

2/13/73

(During this period it appears the cover up had begun to come apart, and the President turned to Charles Colson for advice. (S.A.))

On the night before sentencing, Caulfield again contacted McCord and renewed offers of executive clemency. Caulfield told McCord he was, "Fouling up the game plan." (McCord statement) During the Gray hearing through February of 1973, Gray's testimony regarding evidence turned over to the FBI was considered very sensitive. Questions of executive privilege were also raised when the possibility of Presidential Aides being called to testify became apparent. The investigation of the Watergate break in by the FBI, and the question of who at the White House was appraised and involved in such an investigation, were presented as issues. During this period, and the period immediately preceding it, discussions among the key White House staff and with the President, probably dealt at least partially with the FBI's role in the investigation, Gray's role and activities, the destruction of evidence, executive privilege, and related issues. On 2/5/73, chairman Ervin introduced the resolution to create the Select Committee. From this date until the defeat of all amendments and the naming of Committee members several days later, Dean indicated of meetings and discussions among the White House staff revolved around means of tempering the Committee's mandate and performance. (Dean statement)

The President himself has indicated that his interest in Watergate rose in February and March as the Senate Committee was organized and as hearings were held on the Gray nominations. During this period, he began to meet frequently with Dean in connection with these matters. (8/15/73 statement)

On 2/9/73, Dean met with Director Schlesinger of the CIA regarding the retrieval of certain Watergate evidence from the Department of Justice. Prior to this time, Dean had learned that photographs linking Hunt to the Fielding break in had been turned over to the department; Ehrlichman sought the retrieval on grounds of National Security. (Dean statement)

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In late February, Walters told Dean it would not be possible for the CIA to retrieve such evidence.

Priority: A

2/14/73

Colson at one time claimed that during this meeting, he urged the President to force Mitchell to admit his role in the burglary. He says Nixon's remarks prove he knew no more about the burglary and cover up than he has publicly admitted. (New York Times article, 6/10/73, news file 2345)

Priority: A

(2/16/73)

(NOTE: Nixon met with Pat Gray regarding the nomination for FBI Director. At this time, he told Gray he was relying on the FBI Director to get the straight story. (Gray int: 5))

2/21/73

On February 19 or 20, Haldeman requested that Dean draw up an agenda for a meeting with the President regarding matters which the President should reflect on as a result of the La Costa meetings and subsequent events. This was a likely topic on February 21, 1973.

The next day, February 22, Haldeman requested Dean prepare a briefing paper for Mr. Nixon's meeting that day with Attorney General Kleindienst. Haldeman, and especially Ehrlichman, had complained about Mr. Kleindienst's passive role in the investigation and prosecution. (Dean---TR:2308)

There was an effort to bring Kleindienst back into the family to protect the White House in case further criminal investigations should lead back there. The White House wanted favorable, active direction from the Attorney General. (TR:2307-09)

That talking paper is Dean exhibit 34. It explains that Kleindienst should be asked to remain in office until after the Watergate hearings have passed; the White House felt it could not afford a new Attorney General to handle the potential problems. (Dean TR:2975-76) Haldeman told Dean that exhibit 34 had been reviewed by Mr. Nixon (TR:2309).  
Priority: A

2/27/73

On February 27, Dean had his first Watergate meeting with the President since September 15. At this meeting, the President discussed his conversation with Senator Baker

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and Attorney General Kleindienst. The President asked Dean to report directly to him in the future, and congratulated him on the excellent job Dean had done in dealing with the Watergate issue. (Dean---3:991-92)

(NOTE: The meeting with the President, Ehrlichman, and Hitt; it is unclear who "Hitt" is, but it should be recalled that a Mrs. Hitt is on the board of the Nixon Foundation and a Mr. Hitt was involved in the funneling of campaign funds to Wilbur Mills.)

Priority: A

2/28/73

According to the White House, Dean told the President on February 28 that there was no White House involvement in the Watergate, that Maurice Stans was a victim of circumstances, and that Colson was a lightning rod because of his reputation. (Exhibit 70A)

Dean states that he told the President, he (Dean) "was also involved in the post June 17 activities regarding Watergate" and described to the President "why he had legal problems." The President would not accept his analysis, and told he had no such problems.

The President also asked what part, if any, his brother had played in the Vesco affair. (Dean---3:992-93)

Priority: A

3/1/73

On March 1, Dean met with the President to prepare for an upcoming press conference. At this time, the question of why Dean was sitting in at FBI interviews was anticipated. According to Dean, the President asked him to gather material regarding the uses and abuses of the FBI by previous administrations. The White House account does not include this request, but indicates the President did ask Dean to prepare a report. (Dean---3:993-994; exhibit 70A)

Priority: B

3/73

(NOTE: According to Ehrlichman, in March of 1973 he had a discussion with the President on the Ellsberg burglary and on the need for security. (Ehrlichman---TR:5919-5920))

3/6/73

Dean states that around March 4 or 5 he told Ehrlichman he thought it would be difficult to win a court test of executive privilege regarding Dean's communications with Nixon because Dean seldom met with Nixon and had very few conversations which could be protected. Following this

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conversation with Ehrlichman, Dean began meeting and talking with Nixon with increasing frequency, at Nixon's request. (TR:2320-21)

On March 6, Dean and the President met and discussed executive privilege guidelines, resolving that they should cover former as well as current White House employees. (Exhibit 70A)

Priority: B

3/7/73

Dean testified that his meeting with the President on March 7 dealt with Gray's performance before the Judiciary Committee. The President was critical of Gray, and instructed Dean to tell the Attorney General to cut off Gray from turning over any further Watergate reports to the Judiciary Committee. (Dean ---3:994-95)

The White House statement is that Dean again told the President the White was clean. (Exhibit 70A)

Exhibit 102, a tape recording of a conversation between Gray and Ehrlichman on 3/7 or 3/8, indicates that Dean and Ehrlichman had previously discussed Dean's meeting with the President.

Priority: B

3/8/73

Dean states that this meeting again dealt with Gray's providing files to the Judiciary Committees; the White House indicates the President asked at this time whether Chapin had assisted Segretti and had been told he had not. (Dean---3:996; Exhibit 70A)

Priority: B

3/10-

3/11/73

On March 10, the President phoned John Dean regarding the issuance of a statement on executive privilege. This was issued on March 12. (3:995)

Priority: A (JDE and CCC); B (Dean)

3/13/73

At this meeting between the President and Dean, with Haldeman present for part of the conversation, Dean testified executive privilege was discussed, and that he had told the President of the money demands of the convicted Watergate defendants. The President commented that \$1,000,000 should be no problem, and asked who was primarily responsible for such demands.

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The President also mentioned that Hunt had been promised executive clemency, and that he had discussed the matter with Colson and Ehrlichman. (Dean---3:995)  
Priority: A+

3/14/73 The President and Dean discussed upcoming press conference and the issue of executive privilege. The President also raised the question of how to get Ron Ziegler off the hook on Watergate related questions. (Dean---3:996)  
Priority: A

3/15/73 Following a press conference, the President met with Dean and Moore. They discussed the press conference and, according to White House accounts, resolved to use "separation of powers" rather than executive privilege terminology (Exhibit 70A)  
Priority: B

(Note: that 3:00 P.M. to 4:47 P.M. meeting should be on March 15 rather than March 16)  
Priority: A

continued

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3/16/73

The White House indicates the President met with Dean and reiterated his opposition to the use of raw FBI files by the Judiciary Committee. He also suggested Dean's report be accompanied by an affidavit; Dean indicated the untimely release of a written report might prejudice the rights of innocent people.

In his statement, Dean described this meeting as discussing with Ziegler matters to be followed up on after the previous day's press conference. (Exhibit 70A; Dean-3:996)  
 Priority: A (Colson call)  
 B (remainder)

3/17/73

Dean describes this meeting as a relaxed, rambling conversation (3:996); the White House summarizes several topics discussed. According to Exhibit 70A, preparatory to this meeting, the President had made a note on a press survey containing an article alleging White House involvement for follow-up. At the meeting, Dean suggested again that they bring out 1968 bugging and the President and Kleindienst had advised him against it. Several names were discussed as possibly subject to attack; Colson, Maldeman, Ehrlichman, Mitchell, and Dean, himself. The President asked Dean point blank if he knew about the planned break-in in advance; Dean said No, there was no actual White House involvement regardless of appearances except possibly Strachan. Dean told the President, Magruder had pushed Liddy hard, but that Maldeman was not involved. The President wanted Maldeman, Ehrlichman, and Dean to talk to the Committee, and Dean resisted.

It was also at this meeting, according to both the White House summary and President Nixon's 3/15/73 statement, that Nixon first learned of the plumbers' break-in to the office of Ellsberg's psychiatrist, Dr. Fielding.  
 Priority: A

3/19/73

Senator Ervin appeared on Face the Nation, accusing Dean of hiding behind Executive Privilege. At this meeting, it was discussed what an appropriate response to the Judiciary Committee's questions might be. (Exhibit 70A; 3:997)  
 Priority: B

(3/19-22/73)

(On March 19, 1973, Paul O'Brien came to Dean's office and said that Hunt wanted 72,000 for living expenses and \$50,000 for attorney's fees or he would reveal the seamy things Hunt had done for Ehrlichman at the White House. Dean told Ehrlichman who instructed Dean to call Mitchell. On March 21 or 22, Mitchell told Ehrlichman that Hunt was taken care of properly. (Dean Exec. Sess. 118-119))

Page 21

3/20/73

Dean states he discussed with the President drafts of a response by Dean to the Judiciary Committee, and later, met with him on the same subject. In a phone conversation later this day, Dean testified he told the President he wished to meet with him as soon as possible, because he did not fully realize all the facts and the implications of those facts for the White House.

The White House details a meeting which was a discussion of Mitchell's problems, Vesco, and Gurney's press conference. The President and Moore agreed that the whole investigation should be made public; later that day, the President called Dean and was reassured that there was "not a scintilla of evidence" to indicate White House involvement. Dean suggested at this time that he give the President a more in-depth briefing on what had transpired. (Dean 3:227-228; Exhibit 70A) Priority: A

3/21/73

Dean met with the President on the morning of March 21. According to Dean, his purpose in this meeting was to give the President "a full report of all the facts that he knew and explain to him what he believed to be the implication of those facts." He told the President there was a cancer growing in the presidency and that if it were not removed, the President, himself, would be killed by it. Dean discussed the planning of the Watergate affair and its implementation. He discussed the January and February planning meetings, and mentioned he had informed Haldeman of them and received instructions from him to have nothing to do with the project. He said that Colson had put some pre-Watergate pressure on Magruder relating to the operation, but that he did not have the facts as to the degree of pressure. He said he was not sure if Mitchell had prior knowledge of the break-in, but that he had been told that both Mitchell and Haldeman (through Strachan) had received wire-tap information.

Dean then recounted "the highlights of the cover-up." He said that he, Ehrlichman, Haldeman, Mitchell, and Kalmbach had been involved in raising and paying money to the defendants to achieve their silence. He said that the money-demands from the defendants, especially Hunt, were increasing, and that Hunt was threatening to reveal the "seamy things . . . he had done for the White House" if his requirements were not met. Dean told the President that Magruder had committed perjury before the Grand Jury with Dean's assistance. He stated that more money and more perjury would be required "to perpetuate the cover-up". After Dean made this presentation, Haldeman came into the President's office. (Transcript 2329-2334.)



Page 22

3/21/73  
continued

Haldeman's version of this meeting (after hearing a tape of the conversation) is significantly different (Transcript 6112-15) as is the White House account (Exhibit 76A).

At a second meeting on the afternoon of the 21st, the President met with Dean, Haldeman, Ziegler and Ehrlichman. Dean testified that he told the President that Dean, Haldeman, and Ehrlichman "were all indictable for obstruction of justice". He said it was no longer possible to perpetuate the cover-up and that he would no longer participate in it. (Transcript 224-35)

The versions of the meeting prepared by Haldeman and the White House, again conflict with Dean's account. (Haldeman--Transcript: 5716-13, 5650; Exhibit 76A)  
Priority: A

3/22/73

The President met with Haldeman, Ehrlichman, Mitchell, and Dean. Dean describes the discussions almost exclusively devoted to the question of how to deal with the Ervin Committee; he held it as a further indication that there would be no effort to stop the cover-up from continuing. (Dean 3:1901-1992)

It was also on 3/22 that Gray, testifying before the Senate Judiciary Committee, stated that Dean had "probably lied".  
Priority: A

3/23/73

McCord wrote a letter to the Court, charging perjury, political pressure and the involvement of others in the Watergate case. The President sent Dean to Camp David to prepare a report of his investigation.  
Priority: A

(3/24/73 to  
4/15/73)

(After Dean had spent a weekend at Camp David without preparing a report, the President turned to Ehrlichman and Mitchell, while making inquiries of others. By mid-April, he had received both reports; he turned all information over to Henry Petersen and ordered all staff to testify before the Grand Jury. (President 8/15/73 statement))

(3/28/73)

(Dean, at Haldeman's insistence, met with Magruder and Mitchell. They asked how he planned to handle the meetings of 1/27 and 2/4, stating that if he testified differently from their earlier testimony, it would cause problems. Dean did not agree to corroborate their accounts. (Dean 3:1996-1997))

Page 23

(3/30/73)

(After it became obvious that Dean would not prepare a report of his investigation, the President directed Ehrlichman to investigate, commenting that it was evident to him that Dean "was in the thing up to his eyelids.") (Ehrlichman DEC Deposition 154-156; President 9/15/73 30:40-42)

4/1/73

(This is the only conversation with Colson, between 3/21/73 and 4/12/73. Note that Kent received \$60,000 during this period, which he deposited on 4/4/73. (It is unlikely this meeting will be on tape, as it apparently took place in San Clemente.)

Priority: A

(4/5 to 4/7/73)

(Ehrlichman discussed job possibilities with Matt Byrne, Jr., Judge in the Ellsberg case.)

(4/5/73)

(Gray withdraws his nomination as Director of the FBI.)

(4/5 to 4/15/73)

(During the April 5-15 period, Ehrlichman conducted 10 interviews pursuant to Nixon request he investigate White House people involved in Watergate. On April 5, at San Clemente, O'Brien told Ehrlichman about the planning of the Watergate Break-in; Ehrlichman then informed Nixon. (Ehrlichman transcript: 5781-5782; 5875))

(4/6/73)

(On 4/6/73, Ehrlichman met with Kalmbach to discuss Kalmbach's testimony regarding the raising of money for the Watergate defendants. Following this meeting, it is likely Ehrlichman would have discussed Kalmbach and his activities with the President.)

(4/6/73)

(Dean told Silbert about documents given to Gray, which Gray had denied receiving. Petersen subsequently discussed this with the President, indicating to him that Gray's position was untenable. (Petersen interview))

4/10 to 4/13/73

On April 2, Dean's attorneys went to the government prosecutors and told them Dean was willing to come forward with everything he had on the case.

On the morning of April 8, Dean contacted Waldeman (then in California) and told him that he was going to meet with the prosecutors that day. That afternoon, after seeing the

Page 24

4/10 to  
4/13/73  
continued

prosecutors, Dean met with Waldeman and Ehrlichman in Ehrlichman's office. The following day, April 9, Dean met with Mitchell and told him he was planning to testify fully and honestly.

Throughout the week, Dean met with Waldeman and Ehrlichman. A strategy appeared to be developing to partially uncover the cover-up; to have Mitchell step forward.

On April 13, Waldeman and Ehrlichman informed Dean that Colson had developed a plan to "smoke Mitchell out"; they were cynical about Colson's position and felt he was scrambling to protect himself. (Dean 3:1302-1313) It is likely that these matters were the subject of, or referred to, in conversations the President had with these aides during this period.  
Priority: A

4/14/73

On April 14, Ehrlichman, at a meeting with Waldeman and the President, had presented a theory of the Watergate affair. Based on hearsay evidence, it held that Mitchell, Magruder, and Dean were involved. The President said to set up a meeting with these three and to tell them that they were not serving the President if they were not telling the truth.

Waldeman and Ehrlichman couldn't reach Dean, were told by Mitchell that his conscience was clear, and heard from Magruder that he had just told the whole story to the U.S. Attorney. Waldeman and Ehrlichman returned to the President's office and told him this. The President expressed concern (Waldeman interview 6/14/73, p.12).  
Priority: A

4/15/73

On April 15, 1973, Nixon met with Dean who testified that, inter alia, the President told him that he had been joking when he said that he approved the raising of \$1 million for the Watergate defendants; that he had been foolish to have discussed Executive Clemency with Colson; moreover, Dean told him about his meetings with the U.S. Attorney's office. On this date, the President had several meetings with Ehrlichman, both before and after the significant Dean meeting. At one of these meetings, the destruction, by Gray, of certain documents was discussed. (Waldeman DNC Deposition 5/25/73, 254-255)  
Priority: A

4/15/73

Following a meeting with Petersen and the Watergate prosecutors, Kleindienst contacted and met with the President on April 15. Then, and at a meeting later that day with the President and Henry Petersen, they discussed Magruder's testimony and the findings of the prosecutors. The serious

Page 25

4/15/73  
continued

involvement of the White House staff in the Watergate affair, and in subsequent investigations, led Kleindienst to remove himself from the case. Petersen was given responsibility for the investigation.

Priority: A

4/16/73

Between meetings with Haldeman and Ehrlichman, the President asked Dean to sign two incriminating letters of resignation. Dean refused to do so. (Dean 3:1917-1918)

Priority: A

4/16/73

The President called Petersen and said Dean had claimed he had been granted immunity; questioned Petersen on the subject and indicated he had the Dean call on tape. (Petersen interview)

Priority: A

4/17/73

The President announced he had learned on March 21 of new factors in the investigation, and that new inquiries were underway.

The President met almost continually with his top staff.

Priority: A

4/18/73

On April 18, 1973, Nixon learned that the Justice Department had interrogated (or was planning to interrogate) Hunt about the Fielding break-in. At that time, Nixon directed Petersen to stick to the Watergate investigation instead of National Security matters.

(Nixon-NYT 3/16/73 ?)

Priority: A

4/19/73

On April 19, Moore told Nixon Dean had shown Moore a list of White House personnel who possibly could be indicted. Moore specifically told Nixon Ehrlichman might be involved in the Ellsberg case. (Moore--transcript: 3843-3846)

Priority: A

4/19/73 to  
4/29/73

During this period, the President had his first meetings with Petersen and Wilson, and made his decision to ask for the resignation of Dean, Haldeman, and Ehrlichman.

On the 25th, at the urging of Kleindienst, the President rescinded his previous orders and allowed Petersen to disclose the plumbers' break-in.

It was also during this period that Kalmbach testified to the Grand Jury. All these conversations are likely to relate in whole or in part to such Watergate-related topics or events.

Page 26

According to Bull, the first request to review presidential tapes came April 22, 1973. At that time Haldeman emerged from Nixon's office and indicated he would like access to a series of the recordings. (Bull--D.C. Hearings 378-380)  
Priority: A

4/27/73 Gray attempted to reach Nixon to tender his resignation; spoke instead to Higby who said he would relay the message to Nixon, Haldeman and Ehrlichman.  
(Gray--transcript: 7141-42)

4/30/73 Haldeman, Ehrlichman, Dean and Kleindienst resign.

Kalbach and Rebore discussed Greenspan's charge regarding a \$100,000 contribution from Howard Hughes.  
Priority: A+

6/4/73 On June 4, 1973, for 10 to 13 hours, ending around 10:00 p.m., the President listened to various Watergate tapes. If he did not use earphones, we could have a tape of important White House tapes. Even if he did use earphones, he may well have made relevant remarks, i.e., "get me the April 15 tape".  
Priority: A+++

7/9/73 to 7/11/73 Haldeman given tape of 9/15/72 meeting, as well as several others. (Haldeman transcript: 6563)  
Priority: A

9/29 to 10/1/73 On September 29, 1973, Miss Woods began transcribing the Presidential tapes. At this time, the President listened to part of one tape.

October 1 was the day on which Miss Woods informed the President she had, in some manner, caused a gap in the significant recordings. (None of these conversations should be on tape.)

11/15/73 to 11/17/73 This was a period during which the White House maintains the President, Buzhardt, et al, first realized that the June 20, 1972 tape of Haldeman's meeting with the President (which contained an 18-minute gap) was, in fact, a subpoenaed tape. The President supposedly summoned Mr. Bull and Miss Woods on November 15 and questioned each regarding their role in the erasure (none of these conversations should be on tape).



## **IV. Relevant Pleadings of Selected Court Actions**





SAM J. ERVIN, JR., N.C., CHAIRMAN  
 HOWARD H. BAKER, JR., TENN., VICE CHAIRMAN  
 HERMAN E. TALMADGE, GA. EDWARD J. GURNEY, FLA.  
 DANIEL K. INOUE, HAWAII LOWELL P. WICKER, JR., CONN.  
 JOSEPH M. MONTOYA, N. MEX.

SAMUEL DASH  
 CHIEF COUNSEL AND STAFF DIRECTOR  
 FRED D. THOMPSON  
 MINORITY COUNSEL  
 RUFUS L. EDMISTON  
 DEPUTY COUNSEL

## United States Senate

SELECT COMMITTEE ON  
 PRESIDENTIAL CAMPAIGN ACTIVITIES  
 (PURSUANT TO S. RES. 49, 91st CONGRESS)

WASHINGTON, D.C. 20510

May 7, 1973

The Honorable Richard G. Kleindienst  
 Attorney General  
 Department of Justice  
 Washington, D.C. 20530

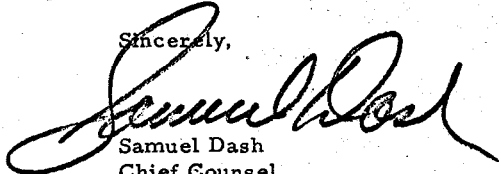
Dear Mr. Kleindienst:

Enclosed please find Notice of Application for Order Conferring Immunity and Compelling Testimony of G. Gordon Liddy in conformance with Title 18, United States Code, Sections 6002(3) and 6005.

The Senate Select Committee requests that you waive the ten day notice provided for in the Statute as well as the additional twenty day period which the Statute also permits you to request on receipt of Notice by the Select Committee.

If you are agreeable to this request of the Select Committee, I would appreciate your sending a form of Waiver of the Notice under the Statute to me at the earliest possible date.

Sincerely,



Samuel Dash  
 Chief Counsel

Encl.

cc:  
 Henry E. Petersen

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

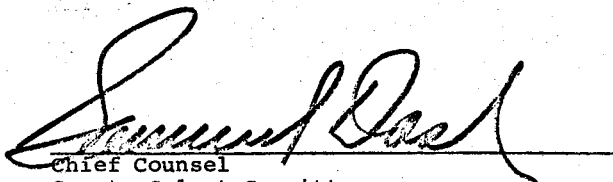
In the Matter of the Application of:

UNITED STATES SENATE SELECT :  
COMMITTEE ON PRESIDENTIAL CAMPAIGN : Misc. No. 70-73  
ACTIVITIES :  
:

NOTICE OF APPLICATION FOR ORDER CONFERRING IMMUNITY  
AND COMPELLING TESTIMONY OF WITNESS

TO: ATTORNEY GENERAL, UNITED STATES DEPARTMENT OF JUSTICE,  
Main Justice Building, 10th and Constitution Avenue,  
N.W., Washington, D.C. 20530

PLEASE TAKE NOTICE that on the 17th day of May ;  
1973, at 10:00 a.m. or as soon thereafter as counsel may be  
heard, in the courtroom of the Honorable John J. Sirica, Chief  
Judge, United States District Court, District of Columbia,  
located in Courtroom No.2, United States District Courthouse,  
Third and Constitution Avenue, N.W., Washington, D.C., the  
undersigned, acting on behalf of the Select Committee on  
Presidential Campaign Activities of the United States Senate,  
will apply to the Court, pursuant to the provisions of  
Title 18, United States Code, Sections 6002(3) and 6005,  
for an order conferring immunity upon and compelling  
G. Gordon Liddy to testify and provide other information in  
an inquiry conducted by said Committee.

  
\_\_\_\_\_  
Chief Counsel  
Senate Select Committee on  
Presidential Campaign Activities

Dated this 7th day of  
May, 1973

ASSISTANT ATTORNEY GENERAL  
CRIMINAL DIVISION

Department of Justice  
Washington 20530

May 10, 1973

Mr. Samuel Dash  
Chief Counsel  
Select Committee on Presidential  
Campaign Activities  
United States Senate  
Washington, D. C. 20510

Dear Sam:

This is in response to your letter of May 7, 1973, with which you enclosed Notices of Application for Orders Conferring Immunity and Compelling Testimony of Witnesses G. Gordon Liddy, Virgilio Gonzalez, Eugenio Martinez, Frank Sturgis and Bernard Barker in conformance with Title 18, U. S. Code, Sections 6002(3) and 6005.

As you know, 28 C.F.R. 0.176 delegates to the Assistant Attorney General, Criminal Division, the authority vested in the Attorney General by Section 6005 of Title 18, U. S. Code. Pursuant to that delegation, I hereby waive the notice provision of 18 U.S.C. 6005(b)(3).

Enclosed are formal waivers for each of the above named witnesses.

Furthermore, I will not apply for the issuance of orders for deferral of the orders for which you are applying with respect to these individuals.

Sincerely,



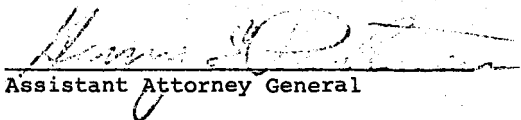
HENRY E. PETERSEN  
Assistant Attorney General

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Application of	)	
	)	
United States Senate Select	)	
Committee on Presidential	)	
Campaign Activities	)	
	)	Misc. No. _____
For an Order Conferring Immunity	)	
and Compelling Testimony of Witness	)	

ACKNOWLEDGEMENT OF SERVICE AND WAIVER OF DELAY

Now comes Henry E. Petersen, Assistant Attorney General in charge of the Criminal Division of the Department of Justice, appearing herein pursuant to the authority vested in him by 18 U.S.C. 6005, and 28 C.F.R. 0.176, and acknowledges service on May 7, 1973, of notice by the Select Committee on Presidential Campaign Activities of the United States Senate, of its intention to request an order or orders requiring G. Gordon Liddy to give testimony or provide other information at a proceeding before it; and said Henry E. Petersen hereby further waives the ten-day delay provided by 18 U.S.C. 6005(b)(3).

  
Assistant Attorney General

Dated this 10th day  
of May, 1973.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Application of :

UNITED STATES SENATE SELECT: Misc. No. 70-73  
COMMITTEE ON PRESIDENTIAL :  
CAMPAIGN ACTIVITIES :

APPLICATION FOR ORDER CONFERRING IMMUNITY UPON AND  
COMPELLING TESTIMONY AND PRODUCTION OF INFORMATION FROM  
G. GORDON LIDDY

The Select Committee on Presidential Campaign Activities of the United States Senate, by its Counsel, hereby applies to this Court for an order conferring immunity upon and compelling G. GORDON LIDDY (the "Witness") to testify and provide other information before this Committee pursuant to the provisions of Title 18, United States Code, Sections 6002 and 6005. In support of this application the Committee states:

1. The Select Committee on Presidential Campaign Activities, pursuant to Senate Resolution 60, Section 1(a), 93rd Congress, 1st Session, is inquiring into the extent, if any, that illegal, improper, or unethical activities were engaged in by any persons, acting individually or in combination with others, in the Presidential election of 1972, or any campaign, canvass, or other activity related to it.

2. The Witness will be subpoenaed to appear before this Committee during hearings that will be held in the near future.

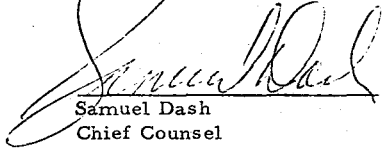
3. It is anticipated that the Witness will invoke his Constitutional privilege against self-incrimination and refuse to testify or provide other information relating to his activities that come within the scope of the investigatory authority established by Senate Resolution 60.

4. This Application has been approved by an affirmative vote of all seven members of the Select Committee as attested to by the Certification of Samuel Dash, Chief Counsel, Senate Select Committee on Presidential

Campaign Activities. The Certification is attached hereto as Exhibit 1.

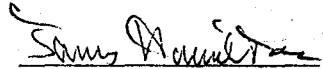
5. Notice of an intention to request this order was given to the Attorney General's designate of the United States as required by Title 18, U.S.C. § 6005(b)(3) on May 7, 1973, as attested to by the Certificate of Service attached hereto as Exhibit 2. The Attorney General's designate has acknowledged service of this notice and has waived his statutory right to a ten day waiting period between notification and request for the order provided for in § 6005(b)(3), as indicated by the documents attached hereto as Exhibit 3. The Attorney General's designate has also stated that he will not seek a deferral of the order pursuant to § 6005(c). See Exhibit 3.

Respectfully submitted,



Samuel Dash  
Chief Counsel

Select Committee on  
Presidential Campaign  
Activities



James Hamilton  
Assistant Chief Counsel

May 7, 1973



Ronald D. Rotunda  
Assistant Counsel

HENRY M. E. TALMADGE, CAL.  
DANIEL K. INOUE, HAWAII  
JOSEPH M. MOFFATT, N. MEX.

EDWARD J. BROWN  
LOWELL P. WICK

CONFIDENTIAL

SAMUEL DASH  
CHIEF COUNSEL AND STAFF DIRECTOR

FRED D. THOMPSON  
MINORITY COUNSEL  
RUFUS L. COMSTEN  
DEPUTY COUNSEL

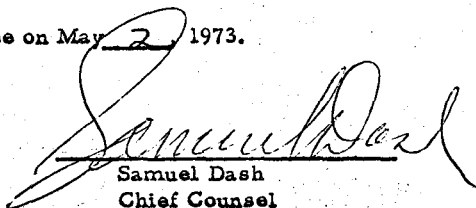
## United States Senate

SELECT COMMITTEE ON  
PRESIDENTIAL CAMPAIGN ACTIVITIES  
(PURSUANT TO S. RES. 14, 91st CONGRESS)

WASHINGTON, D.C. 20510

### CERTIFICATION OF VOTE

I, Samuel Dash, Chief Counsel of the Select Committee on Presidential Campaign Activities of the United States Senate, do hereby certify that the APPLICATION FOR ORDER CONFERRING IMMUNITY UPON AND COMPELLING TESTIMONY AND PRODUCTION OF INFORMATION FROM the Witness filed pursuant to the provisions of Title 18, United States Code, Sections 6002 and 6005 was approved by a unanimous vote of the seven members of said Committee on May 2, 1973.

  
Samuel Dash  
Chief Counsel

May 11, 1973

EXHIBIT 1

JOHN F. LOUD, JR., REC. CHAIRMAN  
 HOWARD H. BAKER, JR., TECH. VICE CHAIRMAN  
 HERMAN E. TALMADGE, GA. EDWARD J. GURNEY, FLA.  
 DANIEL K. INCUTE, HAWAII LOWELL P. WEICKER, JR., CONN.  
 JOSEPH M. MONTOYA, N. MEX.

SAMUEL DASH  
 CHIEF COUNSEL AND STAFF DIRECTOR

FRED D. THOMPSON  
 MINORITY COUNSEL  
 RUPUS L. EDMISTEN  
 DEPUTY COUNSEL

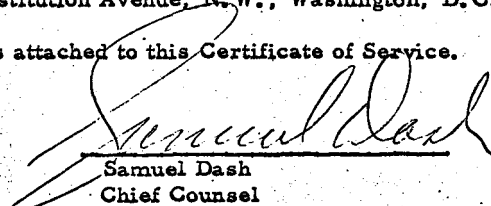
## United States Senate

SELECT COMMITTEE ON  
 PRESIDENTIAL CAMPAIGN ACTIVITIES  
 (PURSUANT TO S. RES. 99, 910 CONGRESS)

WASHINGTON, D.C. 20510

### CERTIFICATE OF SERVICE

I, Samuel Dash, do hereby certify that on the 7  
 day of May, 1973, I served a notice of our intention to seek an  
 order conferring immunity upon and compelling testimony and  
 production of information from the Witnesses, upon the  
 Honorable Richard Kleindienst, Attorney General of the United  
 States and Henry Peterson, his designate, by having said notice  
 hand delivered to him at his office, located in the Main Justice  
 Building, 10th and Constitution Avenue, N.W., Washington, D.C.  
 A copy of this notice is attached to this Certificate of Service.

  
 Samuel Dash  
 Chief Counsel

May 11 1973

EXHIBIT 2



UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Application of:

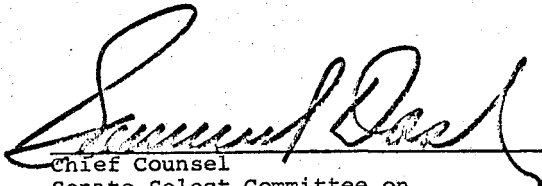
UNITED STATES SENATE SELECT :  
COMMITTEE ON PRESIDENTIAL CAMPAIGN :  
ACTIVITIES :

Misc. No. 70-73

NOTICE OF APPLICATION FOR ORDER CONFERRING IMMUNITY  
AND COMPELLING TESTIMONY OF WITNESS

TO: ATTORNEY GENERAL, UNITED STATES DEPARTMENT OF JUSTICE,  
Main Justice Building, 10th and Constitution Avenue,  
N.W., Washington, D.C. 20530

PLEASE TAKE NOTICE that on the 17th day of May ;  
1973, at 10:00 a.m. or as soon thereafter as counsel may be  
heard, in the courtroom of the Honorable John J. Sirica, Chief  
Judge, United States District Court, District of Columbia,  
located in Courtroom No.2, United States District Courthouse,  
Third and Constitution Avenue, N.W., Washington, D.C., the  
undersigned, acting on behalf of the Select Committee on  
Presidential Campaign Activities of the United States Senate,  
will apply to the Court, pursuant to the provisions of  
Title 18, United States Code, Sections 6002(3) and 6005,  
for an order conferring immunity upon and compelling  
G. Gordon Liddy to testify and provide other information in  
an inquiry conducted by said Committee.

  
\_\_\_\_\_  
Chief Counsel  
Senate Select Committee on  
Presidential Campaign Activities

Dated this 7th day of  
May, 1973

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Application of :

UNITED STATES SENATE SELECT :  
COMMITTEE ON PRESIDENTIAL :  
CAMPAIGN ACTIVITIES :

Misc. No. 70-73

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT  
OF APPLICATION FOR ORDER CONFERRING IMMUNITY UPON  
AND COMPELLING TESTIMONY AND PRODUCTION OF IN-  
FORMATION FROM BERNARD BARKER, EUGENIO MARTINEZ,  
FRANK STURGIS, VIRGILIO GONZALES, AND G. GORDON  
LIDDY.

The Select Committee on Presidential Campaign Activities of  
the United States Senate has applied to this Court for an Order conferring  
immunity upon and compelling Bernard Barker, Eugenio Martinez, Frank  
Sturgis, Virgilio Gonzales and G. Gordon Liddy to testify and provide  
other information before the Committee pursuant to the provisions of Title  
18, United States Code, Sections 6002 and 6005.

These sections, in pertinent part, provide:

"Section 6002. Immunity generally.

"Whenever a witness refuses, on the basis of his  
privilege against self-incrimination to testify or  
provide other information in a proceeding before  
or ancillary to --

\* \* \*

"(3) either House of Congress, a joint committee of the two  
Houses, or a committee or a subcommittee of either House  
and the person presiding over the proceeding communicates  
to the witness an order issued under this part, the witness  
may not refuse to comply with the order on the basis of his  
privilege against self-incrimination; but no testimony or other  
information compelled under the order (or any information  
directly or indirectly derived from such testimony or other  
information) may be used against the witness in any criminal  
case, except a prosecution for perjury, giving a false state-  
ment, or otherwise failing to comply with the order."

"Section 6005. Congressional proceedings.

"(a) In the case of any individual who has been or may be called to testify or provide other information at any proceedings before either House of Congress, or any committee, or any subcommittee of either House, or any joint committee of the two Houses, a United States district court shall issue, in accordance with subsection

(b) of this section, upon the request of a duly authorized representative of the House of Congress or the Committee concerned, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part."

"(b) Before issuing an order under subsection (a) of this section, a United States district court shall find that --

\* \* \*

"(2) in the case of a proceeding before a committee or a subcommittee of either House of Congress or a joint committee of both Houses, the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee; and

"(3) ten days or more prior to the day on which the request for such an order was made, the Attorney General was served with notice of an intention to request the order.

"(c) Upon application of the Attorney General, the United States district court shall defer the issuance of any order under subsection (a) of this section for such period, not longer than twenty days from the date of the request for such order, as the Attorney General may specify."

As the exhibits attached to the present Application indicate, the procedures required by Section 6005 have been met. All seven members of the Select Committee have approved this Application. Moreover, the Select Committee, through its Counsel, has notified the Attorney General's designate of its intention to request the instant order. The Attorney General's designate has acknowledged notice and has waived his right to ten days delay between notice and request under Section 6005(b)(3), as well as his right to further deferral of the order pursuant to Section 6005(c).

Page Three

Because the requirements of Section 6005 have been complied with, the attached order should be entered.

Respectfully submitted,

Samuel Dash (RDR)  
Samuel Dash  
Chief Counsel  
Select Committee on  
Presidential Campaign  
Activities

James Hamilton (RDR)  
James Hamilton  
Assistant Chief Counsel

May 11, 1973

Ronald D. Rotunda  
Ronald D. Rotunda  
Assistant Counsel

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Application of :  
:  
UNITED STATES SENATE SELECT :  
COMMITTEE ON PRESIDENTIAL :  
CAMPAIGN ACTIVITIES :  
:  
:

Misc. No. 70-73

ORDER CONFERRING IMMUNITY UPON AND COMPELLING  
TESTIMONY AND PRODUCTION OF INFORMATION FROM  
G. GORDON LIDDY.

The United States Senate Select Committee on Presidential Campaign Activities, having made written application for an order conferring immunity upon G. Gordon Liddy and compelling him to testify and provide other information before it, pursuant to Title 18, United States Code, Sections 6002 and 6005, and on Court finding that all procedures specified by § 6005 have been duly followed, it is hereby this      day of May, 1973.

ORDERED that the said Witness in accordance with the provisions of Title 18, United States Code, section 6002 and 6005, shall not be excused from testifying or providing other information before the Select Committee on Presidential Campaign Activities on the ground that the testimony or other information sought may tend to incriminate him.

AND IT IS FURTHER ORDERED that the said Witness appear when subpoenaed by said Committee and testify and provide such other information that is sought with respect to the matters under inquiry by said Committee.

AND IT IS FURTHER ORDERED that no testimony or other information compelled under this ORDER (or for any other information directly or indirectly derived from such testimony or other information) may be used

Page 2

against the Witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this ORDER.

---

United States District Judge

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 11th day of May, 1973, served a copy of the attached documents on the Honorable Richard G. Kleindienst, Attorney General of the United States and Henry E. Petersen, his designate, by having said papers hand delivered to his office, located in the Main Justice Building, 10th and Constitution Avenue, N.W., Washington, D.C.

Ronald P. Roberts

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 11th day of May 1973, I served a copy of the attached documents on Thomas A. Kennelly, Esq., attorney for G. Gordon Liddy, 819 H Street, N.W., Washington, D.C. 20006, by depositing same in the U.S. Post Office, postage prepaid.

Ronald D. Edwards



**FILED**

MAY 17 1973

**United States District Court**  
**For The District of Columbia**

JAMES E. DAVEY, Clerk

IN RE: SENATE SELECT COMMITTEE ON

PRESIDENTIAL CAMPAIGN ACTIVITIES

(George Gordon Liddy)

) MISC. NO. 70-73  
)**TRANSCRIPT OF PROCEEDINGS**

Wednesday, May 16, 1973

(Immunity)

COPY FOR: *Senate Select Committee*

PAGES: 1-14

NICHOLAS SOKAL  
OFFICIAL REPORTER  
4800 F. U. S. COURTHOUSE  
WASHINGTON, D. C. 20001

TELE: 426-7454

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

IN RE: SENATE SELECT COMMITTEE ON )  
PRESIDENTIAL CAMPAIGN ACTIVITIES ) MISC. NO. 70-73

Wednesday, May 16, 1973

The above-entitled cause came on for hearing on application by the United States Senate Select Committee on Presidential Campaign Activities for a Grant of Immunity In Re George Gordon Liddy, at 10:00 o'clock a.m., before THE HONORABLE CHIEF JUDGE JOHN J. SIRICA.

APPEARANCES:

On Behalf of the Senate Select Committee:

RONALD ROTUNDA, Esq.  
DAVID DORSEN, Esq.

On Behalf of George Gordon Liddy:

PETER MAROULIS, Esq.

P R O C E E D I N G S

(Mr. Liddy is present in court.)

THE COURT: All right.

MR. ROTUNDA: May it please the Court, my name is Ronald D. Rotunda, Assistant Counsel to the United States Senate Select Committee on Presidential Campaign Activities.

On behalf of the Committee we are applying today for an order conferring immunity and compelling testimony from Mr. G. Gordon Liddy. Let the record reflect I am handing to the clerk the application.

The application indicates that the witness will be subpoenaed by this Committee during hearings that will be held in the near future. The application also indicates by unanimous vote of the Senators of that Committee voted to apply for immunity for Mr. Liddy on May 2nd, 1973. The statutory notice to the Attorney General designate was given on May 7, 1973, and on May 10 Mr. Petersen formally waived his right to a ten day delay and also waived his right to request a further twenty-day delay. We served papers on Mr. Liddy's attorney.

THE COURT: Mr. Maroulis.

MR. MAROULIS: Good morning, Your Honor.

On behalf of Mr. Liddy I am opposing this application and the opposition is based upon the Fifth Amendment to the United States Constitution.

The Fifth Amendment portions which we rely on are two:

The first part is:

"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury."

We submit to Your Honor that there is massive historical precedent that precludes requiring my client to appear before any body absent an indictment or presentment of a grand jury. And I intend to address myself to the historical precedents hereafter.

The second portion of the Fifth Amendment that we rely on is:

"Nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law."

Regarding the decisions of this circuit the Court's attention is respectfully called to Frank vs United States, 347 F.2 486; Jones vs United States, 342 F.2 863; and Powell vs United States 226 F.2 269.

As to the historical argument I would like to, with the permission of the Court, take a few minutes and go through the historical argument that I have been able thus far to put together to bring before the Court.

When the Constitution-makers drew up the Fifth Amendment, they were not articulating a privilege bestowed on the individual by the state; they were rather stating a right of the individual which was founded in a thousand years of common law history, and which would thenceforth be formally protected

and guaranteed in this nation by the Constitution.

The first clause of the Fifth Amendment states:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury..."

That clause was seated on the very basis of our legal system which is accusatorial rather than inquisitorial; that is, no man is bound to accuse himself.

Initially, England followed the ancient Germanic adversary procedure for determining innocence or guilt. Upon accusation proof of innocence could be established three ways:

(1) by ordeal, wherein the accused would be miraculously untouched if innocent;

(2) by compurgation, wherein friends or kindred of the accused and the accused himself would swear to his innocence;

(3) or trial by battle, wherein the accused would be victorious if innocent.

These irrational methods came to be replaced in the 800's and thereafter by an accusatorial system on the part of the state, and an inquisitorial system on the part of the church.

From the 13th century to the end of the 17th century there was continual opposition to the inquisitorial method. It was a struggle between common law and Roman procedure, the common law being basically accusatorial and the Roman law being inquisitorial.

In the 12th century Henry II extended the old Frankish system of inquiry by neighbors, which was the beginning of our grand and petit juries. At this time the accused had the Germanic right to the oath of purgation, or the oath of innocence, whereby he showed his innocence with compurgators. In 1215 King John signed the Magna Charta, and Articles 38 and 39 have particular interest in this vein:

Article 38 says:

"No bailiff from henceforth shall put any man to his law upon his own bare saying, without credible witnesses to prove it."

Article 39 of the Magna Charta says:

"No freeman shall be taken or imprisoned, or disseised, or outlawed, or banished, or any ways destroyed, nor will we pass upon him, nor will we send upon him, unless by the lawful judgement of his peers, or by the law of the land."

It would appear that these two articles articulate in writing for the first time the requirement of presentment which appears in almost every statute pertaining to legal procedure during the next three centuries and which finally evolves into the first clause of the Fifth Amendment. That argument was stated by Circuit Justice Wisdom, speaking for the majority in *DeLuna vs United States* 308 F.2d 140. He recognized there that the germ of the Fifth Amendment is related to Article 38 of the Magna Charta.

While these changes were taking place in the civil law, there were also innovations in the canon law. From 1198 to 1216 Innocent III instituted the inquisitional system through a series of decretals outlining the ex officio oath procedure in which the church official had the power by virtue of his office to require a person to answer truthfully upon his oath all questions put to him. The official was not to proceed against a person without reason, either common report or notorious suspicion. Cardinal Otto introduced this procedure into England in a constitution resulting from the Pan-Anglican Council of London in 1236.

The civil courts began to abandon the old method of oath by compurgation or oath of innocence in favor of the more efficient method of the canon oath ex officio. At the same time the safeguards that Innocent intended were ignored in both the canon and civil courts resulting in widespread opposition to the procedure. Throughout the following 500 years of struggle against the ex officio oath, the grounds were essentially the same: people were opposed to judgement by an official rather than by their own grand jury of neighbors and peers. They were opposed to the interrogatory fishing expeditions which resulted when parties were questioned without proper presentment, that being contrary to the Magna Charta and contrary to the common law. They were opposed to a procedure which required a man to accuse himself, his family or his friends.

During the 14th century there were repeated petitions to the King to prohibit the use of the oath. And as a result

Edward III issued several important statutes, one of them relating to civil courts. 42 Edward III, Chapter 3 states:

"No man shall be put to answer without presentment before justices, or matter of record, or by due process and writ original, according to the old law of the land. "

Edward III's De Articuli Cleri incorporates a previous prohibition of Henry III, limiting the use of the oath by ecclesiastical courts to matrimonial and testamentary causes.

It reads:

"And they suffer not that any Laymen within their Bailiwick, come together in any places to make such recognitions by their Oaths, except in Causes of Matrimony and Testamentary."

In 1382 the prelates had an alleged Act of Parliament put on the statute books which was supposedly enacted during the second session of parliament in the 5th year of the reign of Richard III. The act (Statutes of the Realm 25-26) gave the church the power it wanted against heretics --enforced imprisonment of suspects until they confessed. But at their next session, Commons said they had never assented to the enactment and asked the King to declare the act void, which he did.

De Articulus Cleri was made ineffectual by Henry IV who gave the canon courts the right to determine heresy according to the canonical decrees.



In 1487 the statute which sanctioned the Star Chamber, that is 3 Henry VII, 1, expressly gave it the power to examine the accused on oath in criminal cases with no mention of the restrictions named in the ecclesiastical rulings such as necessary presentment. This was the first formal statement acknowledging the power to use the ex officio oath in civil cases. And by that I mean non-clerical cases. Although as I have mentioned before it is not the first use of it. The authority behind this power was purely statutory and not in keeping with the common law. The Star Chamber survived almost 200 years under this statute.

To abate protest against the ex officio oath Henry VIII enacted a statute providing that:

"Every person and persons being presented or indicted of heresy or duly accused or detected thereof by two lawful witnesses at the least to any Ordinaries of this Realm having power to examine heresies, shall and may after every such accusation or presentment and none otherwise nor by any other means be cited, convented, arrested, or taken..."

The grievance relieved by this statute is clearly against the ex officio oath and the negligence on the part of the courts in not requiring due presentment.

Edward VI took away the church's jurisdiction over heresy. Mary repealed the statutes of Henry VIII and revived

those of Henry IV and the repudiated statute of Richard II. And in the first year of the reign of Elizabeth, she consolidated all power, ecclesiastical and civil, under the auspices of the crown, thus giving her complete jurisdiction in all matters. She had the Star Chamber with its carte blanche statutory powers to investigate and decide civil matters, and she had the Court of High Commission with equally undefined power in ecclesiastical cases.

The opposition this time was led by the Puritans. The basis of their dissent was that the inquisitional technique of forcing a man to accuse himself or inform on his family and friends on oath was contrary to the common law tradition and to the dignity of man. The Puritans had good legal counsel and the sympathy of Commons throughout the battle. During this time the common-law courts nullified punishments imposed by the High Commission for refusing to take the oath.

During this time the courts, speaking for the Queen, made many erroneous historical arguments refuting the accurate historical arguments made by the Puritans. It is sometimes difficult to separate fact from half-truth and fiction during this period. But as the Puritan opposition grew, cases arose in which men flatly refused to take the oath; their statements and the decisions in those cases are clear and irrefutable.

In 1584 an alliance was formed between the Puritans and Commons and there was public support in the form of letters to the Queen for the Puritan cause signed by many prominent

members of Lords. Also in this year Commons drew up a series of complaints, one of which was:

"...to forbear...examinations ex officio mero of godly and learned preachers not detected, that is, accused unto them...and only to deal with them for such matters as shall be detected in them..."

The legal issue centered on a matter of procedure. The Star Chamber and High Commission were requiring men to answer on oath to crimes for which there was no presentment, and sometimes to answer on oath to questions designed to feret out a chargeable crime.

In 1590 the preacher Udall, before the High Commission refused to answer on the grounds that there was no indictment against him; however, a few months later, before a common law jury with proper presentment, he cannot make that claim.

Udall's argument against answering on oath was a new one in the Puritan struggle; it was an appeal to freedom of conscience and claimed that the oath was contrary to common-law tradition. This reliance on the history of the common-law tradition was the turning point in the Puritan struggle against royal prerogative.

The same circumstances held in the Jesuit Garnet's trial of 1606:

"When one is asked a question before a magistrate, he is not bound to answer before some witnesses be produced against him."

That was the proposition.

As Wignore notes this is not a flat refusal to answer, only an acknowledgement of the right to proper presentment. John Lilburne says: "If I had been proceeded against by a bill, I would have answered." In his appeal to the House of Lords in 1646, Lilburne's lawyers argued:

"The ground whereof being that Mr. Lilburn refused to take an oath to answer all such questions as should be demanded of him, it being contrary to the laws of God, nature, and the kingdom, for any man to be his own accuser."

The House of Lords vacated his sentence, saying it was illegal and most unjust, against the liberty of the subject and the law of the land and Magna Charta.

It should be noted that the Star Chamber and High Commission had been abolished in 1641; so that the ex officio oath was prohibited. At the time they were abolished England was in a state of upheaval, Commons was in open revolt, Charles had to give up his royal prerogative. Thus ended in England the inquisitional practice of forcing a man to accuse himself.

Thereafter it began to be accepted that no man is bound to incriminate himself on any charge, no matter how instituted, in any court. The jurisdictional distinction of proper presentment became unnecessary. Acceptance came first in the criminal trials and afterwards in civil cases. By the end of Charles II's reign, the privilege to remain silent was extended to ordinary witnesses, not just to the accused. However, this was in reality not much

more than a rule that judges would recognize only on demand.

"The old habit of questioning and arguing the accused died hard -- did not disappear, indeed, until the 1700's had begun."

In light of the earlier grievances and their resulting statutes, it is clear that Wigmore's appraisal of the development of the right to silence as an outgrowth of jurisdictional jealousy between church and the state in the 16th and 17th centuries is not an adequate explanation. The accusatorial system goes as far back as the Germanic adversary procedure which began to change around 800 towards a more rational judicial process. The oath of the ancient common law was an oath of innocence, not an inquisitorial oath. With the introduction of the Roman inquisitorial procedure, the English people fought against the power that system affords the state as being contrary to the common law and the dignity and autonomy of the individual.

To that sentence, "that the power that system affords the state as being contrary to the common law and the dignity and autonomy of the individual," I add the first clause of the Fifth Amendment and respectfully ask the Court not to grant the order requested.

THE COURT: I take it from your argument, and I have not interrupted you, I think you talked something like 20 minutes or more, Mr. Liddy has all of the rights and the Select Committee has no rights. Is that the interpretation you place on the law in this case?

MR. MAROULIS: I say this, that the Fifth Amendment

says that he need not answer, he need not be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.

THE COURT: As I remember correctly Mr. Liddy had one opportunity, he was granted immunity sometime ago when he went before the grand jury and certain questions were propounded to him, I believe, and he still refused to answer before the grand jury, is that correct?

MR. MAROULIS: Yes, sir.

THE COURT: What is the status of that case before our Court of Appeals today?

MR. MAROULIS: The appeal, I believe, is being docketed on the 21st.

THE COURT: How many days ago did that happen? I have forgotten now when he appeared before the grand jury.

MR. MAROULIS: I can only estimate, Judge. It has to be in excess of a month ago.

THE COURT: Here he is asked to come before a duly constituted Committee of the Senate which is conducting an investigation and one of the principal purposes of that investigation as I understand it is to find out what occurred in this situation, this matter, and if necessary recommend remedial legislation to the Congress to correct any evil that they might uncover. That is usually the purpose of every investigation of that Committee.

You say Congress doesn't have the right to do that and he has the right to flaunt himself in the face of a lawfully

issued subpoena after he is granted immunity, is that your argument to the Court?

MR. MAROULIS: My argument is that he has that right under the Fifth Amendment.

THE COURT: Well, I disagree with you.

I will grant the request of the government. Do you have any objection to the papers filed as to form in this case? I take it you have seen the papers?

MR. MAROULIS: Yes, Your Honor, I have been presented with a copy of the papers. I have no objection as to the form of the papers.

THE COURT: All right.

\* \* \* (10:35 a.m.)

CERTIFICATE

It is certified the foregoing is the official transcript of proceedings indicated.

*Nicholas Sokal*  
NICHOLAS SOKAL  
Official Reporter

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Application of :

UNITED STATES SENATE SELECT :  
COMMITTEE ON PRESIDENTIAL :  
CAMPAIGN ACTIVITIES :

Misc. No. 70-73

FILED  
MAY 16 1973  
JAMES F. DAVEY, Clerk

ORDER CONFERRING IMMUNITY UPON AND COMPELLING  
TESTIMONY AND PRODUCTION OF INFORMATION FROM  
G. GORDON LIDDY.

The United States Senate Select Committee on Presidential Campaign Activities, having made written application for an order conferring immunity upon G. Gordon Liddy and compelling him to testify and provide other information before it, pursuant to Title 18, United States Code, Sections 6002 and 6005, and on Court finding that all procedures specified by § 6005 have been duly followed, it is hereby this <sup>18th</sup> day of May, 1973.

ORDERED that the said Witness in accordance with the provisions of Title 18, United States Code, section 6002 and 6005, shall not be excused from testifying or providing other information before the Select Committee on Presidential Campaign Activities on the ground that the testimony or other information sought may tend to incriminate him.

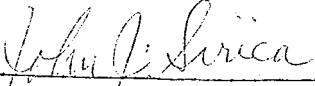
AND IT IS FURTHER ORDERED that the said Witness appear when subpoenaed by said Committee and testify and provide such other information that is sought with respect to the matters under inquiry by said Committee.

AND IT IS FURTHER ORDERED that no testimony or other information compelled under this ORDER (or for any other information directly or indirectly derived from such testimony or other information) may be used



Page 2

against the Witness in any criminal case, except a prosecution for perjury,  
giving a false statement, or otherwise failing to comply with this ORDER.

  
United States District Judge



UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

FILED  
MAY 11 1973

JAMES F. DOWDY  
CLERK

UNITED STATES OF AMERICA :

- v - :

JOHN DOE, et al. :

Misc. No. 77-73

Criminal Case No. 1827-72

MOTION TO OBTAIN DOCUMENTS BY THE SELECT SENATE  
COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES

Comes now the Select Senate Committee on Presidential Campaign Activities (hereinafter referred to as "the Committee"), a regularly constituted committee of the Senate of the United States of America, by its Chief Counsel, Samuel Dash, to move to obtain certain documents hereinafter described that may be under the control and custody of this Honorable Court:

1. On or about May 4, 1973, John Wesley Dean III (hereinafter "Dean") by his attorneys, Shaffer, McKeever & Fitzpatrick, in a Motion to Lodge Documents with the Court (hereinafter "Motion to Lodge Documents"), moved that this Honorable Court accept custody and control of certain documents which Dean had deposited in a safe deposit box located in the Alexandria National Bank (hereinafter "the Bank").

2. In their Motion to Lodge Documents, Dean's attorneys indicated (a) that Dean had had in his possession certain documents identified as a "document containing forty-three (43) numbered pages together with eight (8) supplementary documents, plastic-bound in a blue cover" (Motion to Lodge Documents at Paragraph 8); (b) that the documents were classified within the meaning of Title 18, United States Code, Section 798; (c) that Dean was sent a communication by Senate Majority Leader Mike

- 2 -

Mansfield in the nature of a directive to preserve records or documents that might have a bearing on the Committee's investigation; (d) that Dean has reason to believe that the documents relate to the subject matter of the Committee's investigation; (e) that Dean, anticipating the possible illegal destruction or removal of the documents, secured them in a safe deposit box at the Bank; and (f) that Dean delivered the keys to that safe deposit box, No. 592, to this Honorable Court.

3. The Committee has reason to believe that the documents stored in the Bank's safe deposit box No. 592 relate to "illegal, improper, or unethical activities" in relation to the 1972 presidential campaign that the Committee is empowered to investigate. (Appended hereto as Exhibit A is S. Res. 60, 93rd Cong., 1st Sess. (1973), authorizing the Committee.)

4. Evidence has been developed and received by the Committee to the effect that on prior occasions persons then or previously connected with the White House staff illegally and improperly removed and destroyed records and documents relating to the mandate of the Committee.

5. The Committee appears to fall within the following subsection (c) of Title 18, United States Code Section 798, which creates an exception to the otherwise restricted access to designated classified material:

"Nothing in this section shall prohibit the furnishing upon lawful demand of information to any regularly constituted committee of the Senate or House of Representatives of the United States of America, or joint committee thereof."

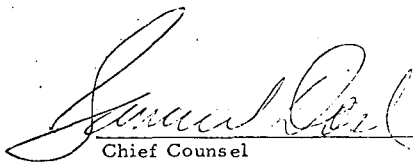
6. Alternatively, and in the event that this Honorable Court does not have control or custody or relinquishes control or custody of the documents requested herein, subpoenas for the production of these documents have been served on Dean, the Bank, and the Executive Office of the President.

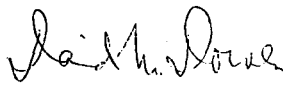
- 3 -

WHEREFORE, the premises considered the Committee prays this Honorable Court to pass an Order:

1. Directing the Clerk of this Honorable Court to deliver to a duly authorized representative of the Select Senate Committee the keys to Safe Deposit Box No. 592 at the Alexandria National Bank to gain access to and to copy the documents described herein.

2. For such other and further relief as this Honorable Court shall deem appropriate.

  
\_\_\_\_\_  
Chief Counsel  
SELECT SENATE COMMITTEE  
ON PRESIDENTIAL CAMPAIGN  
ACTIVITIES

  
\_\_\_\_\_  
David M. Dorsen  
Assistant Chief Counsel

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA :  
 :  
 - v - :  
 :  
 JOHN DOE, et. al. :

Criminal Case No. 1827-72

MEMORANDUM OF POINTS AND AUTHORITIES IN  
SUPPORT OF THE SELECT SENATE COMMITTEE  
ON PRESIDENTIAL CAMPAIGN ACTIVITIES MOTION  
TO OBTAIN DOCUMENTS

1. The authority of Congress to compel production of documents or records is recognized as a necessary correlative to its inherent power to conduct investigations -- so long as these investigations are in furtherance of a legitimate legislative function. McGrain v. Daugherty, 273 U.S. 135 (1927); \* Watkins v. United States, 354 U.S. 178 (1957). Congress's authority to compel the production of documents or records is denoted in Title 2, United States Code, Section 192\*.

2. By Joint Resolution of the Senate, the Select Senate Committee on Presidential Campaign Activities is empowered to investigate "illegal, improper, or unethical activities" in connection with the 1972 presidential election, and to determine the "necessity and desirability" of new legislation to "safeguard the electoral process," S. Res. 60, 93rd Congress, 1st Session (1973)\* (appended hereto as Exhibit A). The Committee has reason to believe that the documents that it seeks to obtain from this Court relate to "illegal, improper, or unethical" activities in connection with the 1972 presidential campaign.

3. John Wesley Dean III in his Motion to Lodge Documents with the Court stated that these documents were classified under Title 18, United States Code, Section 798(a) (3). The protection afforded these documents

Page 2

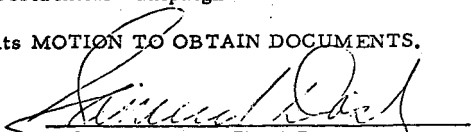
has an exception in the case of a " . . . lawful demand, of information to any regularly constituted committee of the Senate or House of Representatives . . . "U.S.C. § 798(c) (1970).\*

4. The Judiciary may not act to prevent the production of documents or records ordered by Congress pursuant to its investigatory powers until the party subject to the Congress's order has refused to comply with the order and some event "such as arrest, indictment, or conviction brings an actual controversy into the sphere of judicial authority." Pauling v. Eastland, 288 F.2d 126, 129 (D.C. Cir. 1960), cert. denied, 364, U.S. 900 (1960).\* The court in this case refused to issue a declaratory judgment as to the legality of a Senate order for the production of certain documents, stating that

"The courts cannot interfere upon the petition of a person potentially liable to some such event. It is clear to me the doctrine of the separation of powers prevails here."

288 F.2d at 129. In the instant case, Dean's "lodging of the documents with the Court" is, in effect, asking the Court for an advisory opinion or declaratory judgment as to the status of the documents that are the subject of this Motion. Thus, under the authority of this Circuit's ruling in Pauling v. Eastland, this Court would seem to be without authority to withhold from the Select Senate Committee the documents that it herein seeks to obtain.

IN CONCLUSION, and in view of the authorities hereinbefore cited, the Select Senate Committee on Presidential Campaign Activities should obtain the documents as set forth in its MOTION TO OBTAIN DOCUMENTS.



Samuel Dash, Chief Counsel  
Senate Select Committee on Presidential  
Campaign Activities

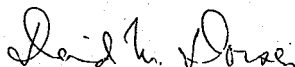


David M. Dorsen, Asst. Chief Counsel

\* Cases or authorities primarily relied upon are marked by asterisks.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing MOTION TO OBTAIN DOCUMENTS and the supporting MEMORANDUM OF POINTS AND AUTHORITIES were delivered this \_\_\_\_\_ day of May, 1973, to Charles Norman Shaffer, 342 Hungerford Court, Rockville, Maryland, 20850, Counsel for John Wesley Dean, III; Earl Silbert, Assistant United States Attorney, United States Courthouse, Washington, D.C. 20001; Leonard Garment, Counsel to the President, Executive Office of the President, The White House, 1600 Pennsylvania Avenue, N.W. Washington, D.C. 20500; and Mr. E. Guy Ridgely, President, Alexandria National Bank, 330 N. Washington Avenue, Alexandria, Virginia 22313.



David M. Dorsen  
Assistant Chief Counsel

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA )

vs )

JOHN DOE, et al )

(John Wesley Dean III) )

MISC. NO. 77-73

Monday, May 14, 1973

The above-entitled cause came on for hearing at  
9:30 a.m., before THE HONORABLE CHIEF JUDGE JOHN J. SIRICA.

APPEARANCES:

HAROLD TITUS, U.S. ATTORNEY FOR D.C.  
EARL SILBERT, ASSIST. U.S. ATTORNEY  
SEYMOUR GLANZER, ASSIST. U.S. ATTORNEY

CHARLES NORMAN SHAFFER, ESQ.  
ROBERT C. MC CANDLESS, ESQ.

DAVID DORSEN, ESQ., ~~OFFICE OF SPECIAL PROSECUTOR~~ *SENATE SELECT COMMITTEE*  
WILLIAM MAYTON, ESQ., ~~OFFICE OF SPECIAL PROSECUTOR~~ *ON PRESIDENTIAL CAMPAIGN*  
CHARLES MORGAN, ESQ. *ACTIVITIES*

**NICHOLAS SOKAL**  
**OFFICIAL COURT REPORTER**  
**4800 - F UNITED STATES COURT HOUSE**  
**WASHINGTON, D. C. 20001**  
**426 - 7454**



P R O C E E D I N G S

MR. SHAFFER: Good morning, Your Honor.

May it please the Court, brothers at the Bar, ladies and gentlemen, my name is Charles Shaffer. I am from Rockville, Your Honor, and I have the privilege of representing Mr. John W. Dean, III, who is the movant in the matter before the Court this morning.

Your Honor, the motion is somewhat self explanatory. Mr. Dean, as you know, and as has been widely circulated in the press and as a fact of which you can take judicial notice was until last Monday employed on the staff of the White House and in his capacity at the White House which terminated sometime around noon and was announced on national television by the President on April 30th, enjoyed the privilege of possessing and using certain classified materials. Upon his termination his classification also terminated, Your Honor, and at that moment he was confronted with his possession or having under his custody and control certain classified documents which are obliquely described in the motion.

At that point he first addressed himself to his continuing problem of not having the clearance but having these items in his control. As you know from the motion, the Honorable Mike Mansfield, the Majority Leader of the Senate, had written my client sometime in January and had asked him to take, in a requesting way, had asked him to take certain steps to insure that any documents that

my client thought might have a bearing upon an undescribed upcoming investigation conducted by the Senate would be preserved. My client considered that not only as a prefatory request but also one that may have some directory power and might subject him to contempt of the Senate if he did not heed that request and as a citizen he thought he should.

So prior to his termination he took steps to insure that these documents would remain in his custody and control should he be abruptly terminated, and as he anticipated, should he not be able to get into his office.

As Your Honor knows in this affair, and Your Honor knows perhaps more than the rest of us knows about, and I say that properly from your continuing connection with the matter in this courtroom--

THE COURT: --there might be some doubt about that.

MR. SHAFFER: Your Honor, I haveno doubt about it and I don't say it in a facetious way, and as a matter of fact, that is why I filed the motion under the miscellaneous number that I did, so that the matter would be brought to your attention. As a lawyer I felt I had to advise my client, I had to advise him in light of the security statute which said he couldn't control that document any longer, and I didn't want him to make a judgment on his own nor did I want to make it for him as to whom he should deliver that document to, and I was always taught

by my father that when you are in trouble the policeman was your friend, and when I got a little older and went to law school I learned that the Court took the place of the policeman, so I thought the best thing to do would be to come to the Court and let the Court decide what disposition if any should be made of the document.

I would also like to say, Your Honor, the reason we went through the mechanics that we did, putting it in a safe deposit box, I had never possessed the document, Your Honor, and I say that as an officer of the court and hope you accept that as a true statement, and I never reviewed the contents of the document and I make that statement under the same circumstances and I have deliberately avoided doing that because I do not enjoy the classification that my client once did, and under the statute I didn't want to violate it. I didn't want to unwittingly put the Court in the position of violating the statute.

THE COURT: By golly, I don't want them to put me in jail.

MR. SHAFFER: Your Honor, I have no fear of that. I just said to my client, look, you are possessing it now and there is no sense enlarging the circle, continue to possess it but get it to a safe deposit box and give me the keys and I'll turn the keys over to the Court and in that way it will be beyond your control because you don't have the keys and it won't be in anybody else's control until you respond to the appropriate

order of the Court.

So, Your Honor, I don't care what you do with the document. Now I have seen a lot of people have come in and say they want the document. I don't consider it my place to tell Your Honor what you should do or shouldn't do with the document even in an advisory way. You don't need advice from me and I have none to offer. And if you do accept the keys to the box we will follow whatever directive you suggest. And I would like to be excused from further proceedings once you accept the keys, if you do, because I properly have no further place in the motion.

Now I did notice that I was directed to bring my client to the courtroom today and I have. And I certainly will abide by whatever rules the Court sets.

THE COURT: Do you have any objection to the Court propounding a few questions to your client? I want to know the type of classification we have in this case.

MR. SHAFFER: I have none whatsoever, Your Honor, but I do want to say this --

THE COURT: --he doesn't have to say anything that might incriminate him.

MR. SHAFFER: Under the Ellis case I am going to make appropriate objections should Your Honor in my humble judgment go beyond the scope of what we have admitted in the motion.

THE COURT: Maybe you can answer the question.

MR. SHAFFER: Your Honor, I don't think I can answer the question because I don't know what the document is.

THE COURT: As I understand the statute there are three specific classifications. The first is Top Secret, Secret, or Confidential.

MR. SHAFFER: That statute is out-dated, Your Honor. They got something better than Top Secret.

THE COURT: What have they got now?

MR. SHAFFER: I don't know what they call it but that is what this document is.

THE COURT: That is what I wanted to ask your client. I wanted the classification.

MR. DEAN: It is Top Secret - Handle via Commit Channels.

THE COURT: Who decides what classification should be given to documents or papers, or anything? Who makes the decision?

MR. DEAN: In this instance it would be the agency who did the classifying.

THE COURT: Which agency was that?

MR. DEAN: This was a combination of several agencies including the FBI and other national security agencies.

THE COURT: All right.

Now, without disclosing the specific contents of the material can you tell the Court in what manner they might effect the national security?

MR. DEAN: Your Honor, the fact that it has the classification on it would indicate that those who did the classifying felt there were items in there that could somehow effect the national security. Having read the statute that covers disclosure of national security matters it would seem in part to fall within some of those restrictions of that statute.

THE COURT: All right. Thank you.

Now, are you a party to this litigation, counsel (addressing Mr. Morgan)?

MR. MORGAN: Well, sir, I haven't been served but if the contents of those documents are wiretap conversations I would think I would be. I wonder would the Court inquire the words "via Comment" as he said the classification?

THE COURT: I don't follow you.

MR. MORGAN: Mr. Dean said it was Top Secret via Comment Channels.

MR. DEAN: It is handled commit --c-o-m-m-i-t channels.

THE COURT: All right, thank you. Mr. Silbert, or Mr. Glanzer?

MR. SILBERT: May it please the Court: Earl Silbert, appearing on behalf of the United States together with Mr. Glanzer, Mr. Campbell and Mr. Titus.

If the Court please, we have filed as I am sure Your Honor is aware, a response to the motion of Mr. Dean. Our position is fairly straight-forward. Since as Mr. Dean acknowledges in the motion that the property that he has filed and

placed in a safe deposit box is property of the United States, that he came into possession of while he was an employee of the United States and because he is no longer an employee of the United States the position of the United States is that that property, that is, the documents should be returned to it.

That is the first reason for our position that we ought to have possession of the documents.

The second reason is also, or emanates from the fact that Mr. Dean in his motion alleges these documents may have a bearing on the matter under investigation by the grand jury which is an arm of this court. For that reason we also want possession of the documents so we may examine them to determine what relevance if any they have to the investigation and if they have any relevance at all to submit them to the grand jury for its consideration in its ongoing investigation.

That briefly is our position, if the Court please.

We have also since we filed our response to the motion of Mr. Dean received copies of motions filed by the Senate Select Committee through its chief counsel, Mr. Dash, and his assistant Mr. Dorsen. We also received a copy of the motion filed by attorneys in the so-called Common Cause litigation. We are prepared to respond to those at this time or at a later time after they have an opportunity to present their position to the Court, depending on Your Honor's desire.

THE COURT: That is a separate proceeding. I am not going to hear the Common Cause matter today. You have so many days to answer their motion. We will have another hearing if necessary on that.

MR. SILBERT: Very well, Your Honor.

With respect to any position that we have taken with respect to those documents we have at no time accepted custody, of course we never seen the documents, we have no idea what is in them other than is contained in the allegations of the motions filed by Mr. Dean and also the allegations or statements made by his counsel here this morning. In fact, at the time the motion was filed we did not even have a top security clearance; since that time we have received such a clearance so I believe we have access to those documents.

THE COURT: All right.

MR. SILBERT: Now at the appropriate time, if Your Honor pleases, I will respond to the request of the Senate for access to those documents.

I might also say if the Court please, as indicated in our motion, though we have asked for return of the documents we have absolutely no objection to a copy of them being retained by Your Honor for whatever use, if any, you deem appropriate.

THE COURT: That is very kind of you offering to do that. Thank you.

Is Mr. Dorsen here?



MR. DORSEN: Yes, Your Honor.

THE COURT: You represent the Senate Committee?

MR. DORSEN: Yes, I do, Your Honor. My name is David Dorsen. I am assistant chief counsel with the committee.

Like other persons who appeared today we do not know of course what is in the documents. On the other hand from the description of Mr. Shaffer it appears to be within our mandate and we would like to have an opportunity to obtain a copy of the documents. We take no position whatsoever on whether the government should have the original documents, we are simply seeking copies of those documents.

As our motion papers indicate there is a threshold question which we pointed out to the Court, and that is whether there is anything correctly before the Court in the nature of jurisdiction over being handed keys to a safe-deposit box.

Our position is that if the Court has jurisdiction we should be entitled to a copy of the documents. If the Court does not have jurisdiction we have subpoenaed the various persons who might get the documents should Your Honor return the keys to Mr. Dean, namely, Mr. Dean, the executive office of the President, and the bank at which the safe deposit box is located.

In sum, we believe as the record now stands we are entitled to copy of those documents and regardless of disposition Your Honor makes on any other portion of the motion that we should be entitled to a copy of those documents.

THE COURT: All right, sir. Mr. Silbert?

MR. SILBERT: Your Honor, I neglected to indicate so far as the motion, the motion before Your Honor is a motion by Mr. Dean to file the documents with the Court, via the form he has indicated. We have absolutely no objection to the granting of that motion and our position becomes relevant only after Your Honor makes a disposition of that motion. We join in his motion. They should be filed with the Court because of the circumstances in which he finds himself and in a sense he is filing the equivalent of an interpleader motion.

Now, the reason for the suggestion with respect to Your Honor retaining a copy of the documents even though the United States feels it is entitled to their return to avoid any possibility of the appearance of subsequent destruction or mishandling of the documents, retention of the documents by Your Honor, copy of the documents would clear away the possibility of such an allegation ever being made or having any substance to it if indeed it was made.

With respect to the position of the Senate, Your Honor, we do not oppose the Senate receiving a copy of those documents. We do have one problem, however, and that is because of the fact that as represented to Your Honor by both Mr. Shaffer and his client, Mr. Dean, the nature of the security classification of those documents as an initial matter we think if Your Honor grants

access to the Senate Select Committee that access should be limited to the Chairman, Senator Ervin, or the Vice Chairman, Senator Baker, or any other senator who is a member of that committee, senator or senators designated by the chairman or vice chairman.

Based on what these documents turn out to be and their relevance if any to the investigation, then if the Senate wants to take appropriate steps to make sure the staff members receive the appropriate clearance then of course we would fully cooperate with them in this matter and have no objection.

So to summarize again, if the Court please, no objection from our part to the Senate Select Committee having either access to or copy of those documents retained by the Court, but as an initial step we simply point out to the Court because of the nature of the security classification that initial access should be limited as I previously outlined to Your Honor.

THE COURT: All right. Anything else?

Title 18 of the United States Code, Section (4)(c) states:

"Nothing in this section shall prohibit the furnishing upon lawful demand of information to any regularly constituted committee of the Senate or House of Representatives of the United States of America, or joint committee thereof."

I think you gentlemen have probably come to the same

conclusion I have come to in this matter.

First of all, I will ask counsel to prepare an order. Agree upon an order which will contain the substance of what I am about to say.

The original copies of the documents should remain in the possession of the Clerk of this Court. This Court does not want to look at those documents at this time, at least. The Clerk will furnish certified copies of those documents to counsel for the government for such use as they think they are entitled to use them for. For instance, matters before the grand jury or other matters.

Also, a certified copy of those documents in the safe deposit box will be furnished to Committee counsel.

I think the suggestion that Mr. Silbert made is a good one. For the time being at least they ought to be limited to the Chairman, the vice-chairman and such other members the chairman might designate, or vice chairman. In other words, these documents should be kept secret until such time as the committee believes they should be released to the public or released in a public hearing. And I am sure the government counsel realize the importance of that also.

That will be the order. Counsel prepare an order. I will ask my clerk, Mr. Christofferson, Mr. Dean, counsel for Mr. Dean, go to the bank, turn the keys over, obtain those

documents, bring them back, turn them over to Mr. Capitanio (courtroom clerk) and he will have xerox copies made and certified for counsel. The originals will remain in the possession of the Clerk of the Court. I am sure they will be safe there.

Anything further?

MR. SHAFFER: Your Honor, it is implicit you granted my motion but may we say that in the order?

THE COURT: Yes. Motion granted; government's request is granted. All right. Everybody wins.

\* \* \* (10:25 a.m.)

CERTIFICATE

It is certified the foregoing is the official transcript of proceedings indicated.

*Nicholas SJKAL*  
NICHOLAS SJKAL  
Official Reporter

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

United States of America :  
v. : Miscellaneous No. 77 - 73  
John Doe, et al. :

O R D E R

FILED  
MAY 14 1973  
JAMES F. DAVEY, Clerk

This matter having come before the Court on the motion of John Wesley Dean, III, to Lodge Document with the Court; and

Both the United States of America, through the United States Attorney, and the Senate Select Committee on Presidential Campaign Activities, through its counsel, having filed pleadings in which they requested or moved the Court to furnish them with the documents referred to in the motion of Dean; and

The Court having held a hearing on this matter on May 14, 1973, at which time Mr. Dean was present and represented by counsel, and the United States Attorney and counsel for the Senate Select Committee were present; and

The Court having heard oral argument of counsel; and

The Court having examined the motions and other pleadings relevant to this matter;

It is by the Court this 14<sup>th</sup> day of May, 1973,

ORDERED that the motion of John Wesley Dean, III, to lodge documents with the Court is hereby granted; and it is

FURTHER ORDERED that Mr. Dean is hereby directed to receive from the Court or its authorized representative the keys previously delivered to it to the safety deposit box specified in his motions; that upon receipt of the keys, Mr. Dean, with his counsel, with the courtroom clerk, Mr. James Capitanio, and with a law clerk of the Court, D. Todd Christofferson, is to proceed forthwith to the safety deposit box and remove from it the documents; that Mr. Dean, upon removal of the documents, is to deliver them to the courtroom clerk Mr. Capitanio; and it is

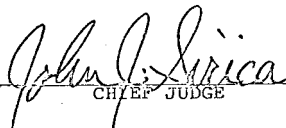
- 2 -

FURTHER ORDERED that the courtroom clerk is to take custody of these documents and place them under seal; and it is

FURTHER ORDERED that a certified copy of these documents is to be given to the United States by delivery to the appropriate representative of the Office of the United States Attorney for the District of Columbia; and it is

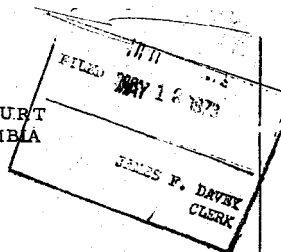
FURTHER ORDERED that the United States Attorney or his authorized representatives are to submit to the grand jury for its consideration any or parts of the documents which relate directly or indirectly, to its investigation into the Watergate incident; and it is

FURTHER ORDERED that certified copy of the documents is to be given to counsel for the Senate Select Committee on Presidential Campaign Activities for delivery to the Chairman of the Committee, the Vice-Chairman of the Committee, or any United States Senator who is a member of the Committee, designated by the Chairman or Vice-Chairman as authorized to receive the documents.

  
\_\_\_\_\_  
CHIEF JUDGE  
A TRUE COPY

JAMES F. DUFFY, Clerk  
By   
\_\_\_\_\_  
Deputy Clerk

UNITED STATES DISTRICT COURT  
OF THE DISTRICT OF COLUMBIA



In the Matter of the Application of :  
:  
UNITED STATES SENATE SELECT :  
COMMITTEE ON PRESIDENTIAL :  
CAMPAIGN ACTIVITIES :  
:

Misc. No. 70-73

APPLICATION FOR ORDER CONFERRING IMMUNITY UPON AND  
COMPELLING TESTIMONY AND PRODUCTION OF INFORMATION  
FROM JEB STUART MAGRUDE

The Select Committee on Presidential Campaign Activities of the United States Senate, by its Counsel, hereby applies to this Court for an order conferring immunity upon and compelling Jeb Stuart Magruder (the "Witness") to testify and provide other information before this Committee pursuant to the provisions of Title 18, United States Code, Sections 6002 and 6005. In support of this application the Committee states:

1. The Select Committee on Presidential Campaign Activities, pursuant to Senate Resolution 60, Section 1(a), 93rd Congress, 1st Session, is inquiring into the extent, if any, that illegal, improper, or unethical activities were engaged in by any persons, acting individually or in combination with others, in the Presidential election of 1972, or any campaign, canvass, or other activity related to it.
2. The Witness will be subpoenaed to appear before this Committee during hearings that will be held in the near future.
3. It is anticipated that the Witness will invoke his Constitutional privilege against self-incrimination and refuse to testify or provide other information relating to his activities that come within the scope of the investigatory authority established by Senate Resolution 60.
4. This Application has been approved by an affirmative vote of all seven members of the Select Committee as attested to by the Certification of Samuel Dash, Chief Counsel, Senate Select Committee on Presidential



Campaign Activities. The Certification is attached hereto as Exhibit 1.

5. Notice of an intention to request this order was given to the Attorney General's designate of the United States as required by Title 18, U.S.C. §s 6005 (b)(3) on May 7, 1973, as attested to by the Certificate of Service attached hereto as Exhibit 2. The Attorney General's designate's ten day waiting period between notification and request for the order provided for in §s 6005 (b)(3), has expired.

Respectfully submitted,

Samuel Dash (ROR)

Samuel Dash  
Chief Counsel

Select Committee on  
Presidential Campaign  
Activities

James Hamilton (ROR)

James Hamilton  
Assistant Chief Counsel

May 18, 1973

Ronald D. Rotunda

Ronald D. Rotunda  
Assistant Counsel

SAM J. ERVIN, JR., N.C., CHAIRMAN  
 EDWARD M. BAKER, JR., TENN., VICE CHAIRMAN  
 HERMAN E. TALMADGE, GA. EDWARD J. GURNEY, FLA.  
 DANIEL K. INOUE, HAWAII LOWELL P. WEICKER, JR., CONN.  
 JOSEPH M. MONTOYA, N. MEX.

SAMUEL DASH  
 CHIEF COUNSEL AND STAFF DIRECTOR  
 FRED D. THOMPSON  
 MINORITY COUNSEL  
 RUFUS L. EDMISTER  
 DEPUTY COUNSEL

## United States Senate

SELECT COMMITTEE ON  
 PRESIDENTIAL CAMPAIGN ACTIVITIES  
 (PURSUANT TO S. RES. 99, 90 CONGRESS)

WASHINGTON, D.C. 20510

### CERTIFICATION OF VOTE

I, Samuel Dash, Chief Counsel of the Select Committee on Presidential Campaign Activities of the United States Senate, do hereby certify that the APPLICATION FOR ORDER CONFERRING IMMUNITY UPON AND COMPELLING TESTIMONY AND PRODUCTION OF INFORMATION FROM Jeb Stuart Magruder filed pursuant to the provisions of Title 18, United States Code, Sections 6002 and 6005 was approved by a unanimous vote of the seven members of said Committee on May 2, 1973.

*Samuel Dash* (RA)  
 Samuel Dash  
 Chief Counsel

May 18, 1973

EXHIBIT 1

EDWARD N. BAKER, JR., FELLOW, VILLIERS PLAN  
 HERMAN E. TALMADGE, GA. EDWARD J. BARNETT, FLA.  
 DANIEL K. BOUTY, HARVARD LOWELL P. WICKER, JR., CONN.  
 JOSEPH M. MONTOYA, N. MEX.

SAMUEL DASH  
 CHIEF COUNSEL AND STAFF DIRECTOR

FRED D. THOMPSON  
 MINORITY COUNSEL  
 RUFUS L. EDMISTON  
 DEPUTY COUNSEL

## United States Senate

SELECT COMMITTEE ON  
 PRESIDENTIAL CAMPAIGN ACTIVITIES  
 (PURSUANT TO S. RES. 44, 92D CONGRESS)

WASHINGTON, D.C. 20510

### CERTIFICATE OF SERVICE

I, Samuel Dash, do hereby certify that on the 7th day of May, 1973, I served a notice of our intention to seek an order conferring immunity upon and compelling testimony and production of information from Jeb Stuart Magruder, upon the Honorable Richard Kleindienst, Attorney General of the United States and Henry Peterson, his designate, by having said notice hand delivered to him at his office, located in the Main Justice Building, 10th and Constitution Avenue, N. W., Washington, D. C. A copy of this notice is attached to this Certificate of Service.

Samuel Dash (RGE)

Samuel Dash  
 Chief Counsel

May 18, 1973

EXHIBIT 2

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Application of:

UNITED STATES SENATE SELECT :  
COMMITTEE ON PRESIDENTIAL CAMPAIGN :  
ACTIVITIES :

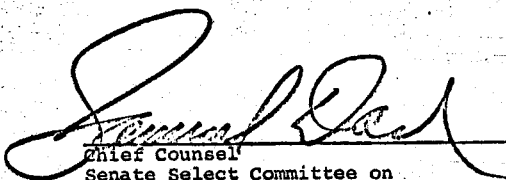
Misc. No. 70-73

NOTICE OF APPLICATION FOR ORDER CONFERRING IMMUNITY  
AND COMPELLING TESTIMONY OF WITNESS

TO: ATTORNEY GENERAL, UNITED STATES DEPARTMENT OF JUSTICE,  
Main Justice Building, 10th and Constitution Avenue,  
N.W., Washington, D.C. 20530

PLEASE TAKE NOTICE that on the 17th day of May:

1973, at 10:00 A.M. or as soon thereafter as counsel may be heard, in the courtroom of the Honorable John J. Sirica, Chief Judge, United States District Court, District of Columbia, located in Courtroom No. 2, United States District Courthouse, Third and Constitution Avenue, N.W., Washington, D.C., the undersigned, acting on behalf of the Select Committee on Presidential Campaign Activities of the United States Senate, will apply to the Court, pursuant to the provisions of Title 18, United States Code, Sections 6002(3) and 6005, for an order conferring immunity upon and compelling Jeb Stuart Magruder to testify and provide other information in an inquiry conducted by said Committee.

  
Chief Counsel  
Senate Select Committee on  
Presidential Campaign Activities

Dated this 7th day of  
May, 1973

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Application of :

UNITED STATES SENATE SELECT :  
COMMITTEE ON PRESIDENTIAL :  
CAMPAIGN ACTIVITIES :

Misc. No. 70-73

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT  
OF APPLICATION FOR ORDER CONFERRING IMMUNITY UPON  
AND COMPELLING TESTIMONY AND PRODUCTION OF  
INFORMATION FROM JEB STUART MAGRUDER

The Select Committee on Presidential Campaign Activities of the United States Senate has applied to this Court for an Order conferring immunity upon and compelling Jeb Stuart Magruder to testify and provide other information before the Committee pursuant to the provisions of Title 18, United States Code, Sections 6002 and 6005.

These sections, in pertinent part, provide:

"Section 6002. Immunity generally.

"Whenever a witness refuses, on the basis of his privilege against self-incrimination to testify or provide other information in a proceeding before or ancillary to --

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"(3) either House of Congress, a joint Committee of the two Houses, or a committee or a subcommittee of either House and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

Page 2

"Section 6005. Congressional proceedings.

"(a) In the case of any individual who has been or may be called to testify or provide other information at any proceedings before either House of Congress, or any committee or any subcommittee of either House, or any joint committee of the two Houses, a United States district court shall issue, in accordance with subsection (b) of this section, upon the request of a duly authorized representative of the House of Congress or the Committee concerned, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part. "

"(b) Before issuing an order under subsection (a) of this section, a United States district court shall find that--

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"(2) in the case of a proceeding before a committee or a subcommittee of either House of Congress or a joint committee of both Houses, the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee; and

"(3) ten days or more prior to the day on which the request for such an order was made, the Attorney General was served with notice of an intention to request the order.

"(c) Upon application of the Attorney General, the United States district court shall defer the issuance of any order under subsection (a) of this section for such period, not longer than twenty days from the date of the request for such order, as the Attorney General may specify."

As the exhibits attached to the present Application indicate, the procedures required by Section 6005 have been met. All seven members of the Select Committee have approved this Application. Moreover, the Select Committee, through its Counsel, has notified the Attorney General's designate of its intention to request the instant order. The Attorney General's designate's ten day waiting period between notification and request for the order provided for in ss 6005 (b)(3), has expired.

Page 3

Because the requirements of Section 6005 have been complied with, the attached order should be entered.

Respectfully submitted,

Samuel Dash (RDR)  
Samuel Dash  
Chief Counsel  
Select Committee on  
Presidential Campaign Activities

James Hamilton (RDR)  
James Hamilton  
Assistant Chief Counsel

May 18, 1973

Ronald D. Rotunda  
Ronald D. Rotunda  
Assistant Counsel

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Application of:

UNITED STATES SENATE SELECT  
COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES

Misc. No. 70-73

ORDER CONFERRING IMMUNITY UPON AND COMPELLING  
TESTIMONY AND PRODUCTION OF INFORMATION FROM  
JEB STUART MAGRUDER

The United States Senate Select Committee on Presidential Campaign Activities, having made written application for an order conferring immunity upon Jeb Stuart Magruder and compelling him to testify and provide other information before it, pursuant to Title 18, United States Code, Sections 6002 and 6005, and on Court finding that all procedures specified by <sup>s</sup>s 6005 have been duly followed, it is hereby this                      day of May, 1973

ORDERED that the said Witness in accordance with the provisions of Title 18, United States Code, section 6002 and 6005, shall not be excused from testifying or providing other information before the Select Committee on Presidential Campaign Activities on the ground that the testimony or other information sought may tend to incriminate him.

AND IT IS FURTHER ORDERED that the said Witness appear when subpoenaed by said Committee and testify and provide such other information that is sought with respect to the matters under inquiry by said Committee.

AND IT IS FURTHER ORDERED that no testimony or other information compelled under this ORDER (or for any other information directly or indirectly derived from such testimony or other information) may be used against the Witness in any criminal case, except for perjury, giving a false statement, or otherwise failing to comply with this ORDER.

United States District Judge



CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 18th day of May, 1973, served a copy of the attached documents on the Honorable Richard G. Kleindienst, Attorney General of the United States and Henry E. Petersen, his designate, by having said papers hand delivered to his office, located in the Main Justice Building, 10th and Constitution Avenue, N. W., Washington, D. C. and I served a copy of the attached documents on Mr. James Bierbower, attorney for Jeb Stuart Magruder, by having said papers hand delivered to his office, located at 1625 K Street, N. W., Washington, D. C.

Ronald W. Rotunda

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Application of )

) Misc. No. \_\_\_\_\_

United States Senate Select Committee)  
on Presidential Campaign Activities)


APPLICATION TO DEFER ISSUANCE OF ANY ORDER  
REQUIRING THE TESTIMONY AND  
PRODUCTION OF INFORMATION  
FROM JEB STUART MAGRUDER

Henry E. Petersen, Assistant Attorney General in charge of the Criminal Division of the Department of Justice, appearing herein pursuant to the authority vested in him by 18 U.S.C. 6005, and 28 C.F.R. 0.176, hereby acknowledges the receipt by him on May 7, 1973, of Notice by Senate Select Committee on Presidential Campaign Activities that said Select Committee acting through its Chief Counsel, Samuel Dash, would on May 17, 1973, apply to this Court, pursuant to the provisions of 18 U.S.C. 6002(3) and 6005, for an order conferring immunity upon and compelling Jeb Stuart Magruder to testify and provide other information in an inquiry conducted by said Select Committee.

Pursuant to the authority vested in him by 18 U.S.C. 6005 and 28 C.F.R. 0.176, the said Assistant Attorney General Henry E. Petersen hereby requests this Court, pursuant to the

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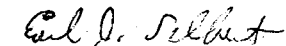
provisions of 18 U.S.C. 6005(c), to defer for a period of twenty (20) days from the date of the request by the Select Committee for such order the issuance of any order under 18 U.S.C. 6005(a) requiring Jeb Stuart Magruder to give testimony or provide other information at any proceeding before the Select Committee

  
Assistant Attorney General

Dated this 21<sup>st</sup> day of  
May, 1973.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Application to Defer Issuance of any Order Requiring the Testimony and Production of Information from Jeb Stuart Magruder has been mailed to Samuel Dash, Chief Counsel, United States Senate, Select Committee on Presidential Campaign Activities, Washington, D.C. 20510, this 21st day of May, 1973.

  
EARL J. SILBERT, Principal  
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

IN RE: }

APPLICATION OF THE UNITED STATES }  
SENATE SELECT COMMITTEE ON }  
PRESIDENTIAL CAMPAIGN ACTIVITIES }

Misc. No. 70-78

ORDER

Upon consideration of the Application of the Assistant Attorney General to Defer Issuance of Any Order Requiring the Testimony and Production of Information from Jeb Stuart Magruder filed with the Court on May 21, 1973, it is by the Court this 30th day of May, 1973,

ORDERED that the Application of the Assistant Attorney General be, and the same hereby is, granted.

John J. Sirica  
Chief Judge

A TRUE COPY

JAMES F. DAVEY, Clerk

By James P. Capitanio  
Deputy Clerk

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

FILED

MAY 31 1973

JAMES F. DAVEY  
CLERK

In the Matter of the Application of :  
:  
UNITED STATES SENATE SELECT :  
COMMITTEE ON PRESIDENTIAL :  
CAMPAIGN ACTIVITIES :  
:

Misc. No. 70-73

SUPPLEMENTARY MEMORANDUM OF POINTS AND AUTHORITIES IN  
SUPPORT OF APPLICATION FOR ORDER CONFERRING IMMUNITY  
UPON AND COMPELLING TESTIMONY AND PRODUCTION OF  
INFORMATION FROM JEB STUART MAGRUDER

On May 18, 1973, the Select Committee filed an Application to this Court for an order conferring immunity upon and compelling Jeb Stuart Magruder to testify and provide other information before the Committee pursuant to 18 U. S. C. §§ 6002, 6005. The Court has asked for briefing as to whether it has discretion to deny this application if the procedural requirements specified by the statute have been met (as they have been in the present case). It is the Select Committee's position that it is patent from the language of the statute, its legislative history and applicable case law that no such discretion exists and, perforce, the requested order must issue.

1. The prescription in § 6005 could hardly be plainer. That section provides that if the requisite procedures have been followed--i. e., the request for an immunity order has been approved by a two-thirds vote of the members of the Committee and the Attorney General has been notified ten days previous to the filing of the Application- the order "shall issue." This provision, we respectfully urge, leaves no room for Court discretion.

Moreover, the Attorney General has no power under the statute to block the issuance of an immunity order. The statute does provide that

he be notified ten days before the request is filed (a right he can waive); it also provides that the Attorney General can require the Court to defer issuance of the order for an additional twenty days thereafter. Nowhere, however, is it even suggested that he has veto power over issuance of the order.\* It is useful to juxtapose the Attorney General's powers in this regard with those he has under sections 6003 and 6004 regarding grants of immunity to those testifying before Grand Juries, in criminal trials, or in administrative proceedings; in each of these situations the Attorney General can prohibit the issuance of an immunity order. Surely, if Congress had intended that the Attorney General--or the Court--have power to deny an immunity order in the Congressional context, it would have used different language than that employed.

2. The legislative history of section 6005 supports these conclusions.

As stated in H. R. Rep. No. 91-1549, 91st Cong., 2d Sess. (Sept. 30, 1970) at p. 43:

"Section 6005 sets out the procedure to be followed in Congressional proceedings. A court order must be obtained based on an affirmative vote of a majority of members present in a proceeding before either House or a two-thirds vote of the members of the full committee in a proceeding before a committee. Ten days' notice must be given to the Attorney General prior to seeking the order. The Court must defer issuance up to 20 days at the Attorney General's request. However, the Attorney General is not given veto power. Nor is the court given any power to withhold the order if the factual prerequisites are met." (Emphasis added)

\*

The right to what amounts to a thirty day delay between notice and the actual issuance of the order allows the Attorney General to isolate evidence independent of the witness' testimony upon which to base a subsequent prosecution. National Commission on Reform of Federal Criminal Laws, Working Papers at 1406. This is the sole protection Congress has provided to insure that criminal prosecution not be jeopardized--there is no further provision allowing the Attorney General to block immunity if he believes it will make future prosecution more difficult. Moreover, we would suggest that, in the present case, the government has had enough time--around eleven months--to isolate independent evidence with which to prosecute Mr. Magruder.

The last two sentences of the above paragraph are repeated verbatim in Senate Report 91-617, 91st Cong., 1st Sess. (Dec. 18, 1969), at 146.

And, at 145, the Senate Report states:

"The court's role in granting the order is merely to find the facts on which the order is predicated. The statutory language is 'shall.'"

That neither the Court nor the Attorney General has discretion to deny an immunity order when the appropriate procedures have been followed is also clear from the Working Papers of the National Commission for the Reform of Federal Criminal Laws, the body that proposed the initial draft of what became section 6005. In regard to the powers of the Court, the Commission (at p. 1440) said:

"The draft statute, accordingly, in continuing the requirement of application to a United States district court, makes more clear than the present statute the intention that the court's function is not discretionary. The court 'shall' issue the direction to testify subject to a finding that the procedural requirements concerning specified voting arrangements in Congress, and notice to the Attorney General, have been met."  
(emphasis added)

Respecting the Attorney General's prerogatives, the Commission (at 1440) declared:

"In the special instance of congressional inquiries, in contrast to administrative proceedings, it would be virtually unthinkable to give the Attorney General the additional power of disapproval or conferment of immunity, because in a Teapot Dome-type congressional investigation, the Attorney General himself would be the focus of the inquiry."

3 There is also case law in this jurisdiction that bolsters the conclusion that the Court must grant the order if procedural regularity is

apparent. In re McElrath, 101 U.S. App D.C. 290, 248 F 2d 612 (1957) was an en banc decision, involving a request for immunity by the Senate Committee on the Judiciary and its Internal Security Subcommittee to which the prospective witness objected, that was decided under the predecessor to section 6005. That statute would, on its face, have allowed far more discretion to the District Court than the present statute. The McElrath statute provided only that the requested immunity order "may be issued upon application by a duly authorized representative of...the committee concerned." Judge Burger, speaking for four concurring judges, stated:

"The discretion of the District Court is limited at this stage to a determination of the procedural regularity of an application and does not embrace such issues as the scope of the inquiry of the Committee, the pertinency and relevancy of the questions propounded or the constitutionality of the statute." 101 U.S. App D.C. at 295.

The present statute, of course, provides that "a United States district court shall issue .... upon the request of a duly authorized representative of the House of Congress or the Committee concerned, an order requiring such individual to give testimony ..." In view of the unchallenged language in the McElrath concurrence that concerned a far less restrictive statute than now involved, we fail to see how this Court in the present case can conclude that it has discretion to deny the requested order since all procedural requirements have been observed.

4. There is a further consideration that counsels against the Court's denying immunity in this case. We deal here with a delicate issue of separation of powers. The Congress has enacted -- and the Executive has signed into law -- a statute that on its face allows a Congressional Committee, in regard to a witness testifying before it, to obtain an immunity\* order even if the District Judge believes the order is unfair

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The use of immunity is, of course, a well-recognized investigatory tool frequently employed by both prosecutorial and legislative bodies. See e.g. Kastigar v. United States, 406 U.S. 441 (1972); Murphy v. Waterfront Commission, 378 U.S. 52, 94-95 (1964) (White, J. concurring).



or unwise. We urge with deference that this Court should be extremely hesitant to interfere with the Select Committee's prescribed investigatory prerogatives, which are plainly a necessary concomitant to the Senate's legislative functions, in the absence of a clear statutory command authorizing such interference.

Worthy of note in this regard is Justice Frankfurter's opinion for the Court in Ullman v. United States, 350 U.S. 422 (1956) which concerned a predecessor immunity statute dealing with applications by the United States Attorney that required the immunity grant to be "necessary to the public interest." Justice Frankfurter, in order to avoid a construction of the statute that would raise serious constitutional problems of separation of powers, held that the statute gave the District Court no discretionary power to determine whether an immunity grant was in the public interest once it was determined that certain procedural requirements had been met. Id. at 431-4. The conclusion that the "public interest" required immunity was to be left solely to the U. S. Attorney. Such a nondiscretionary function by the Court would be within its proper judicial power and would not usurp the constitutional power of a coordinate branch;

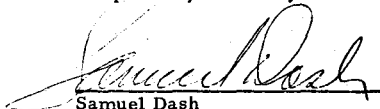
"Since the Court's duty . . . is only to ascertain whether the statutory requirements are complied with by the grand jury, the United States Attorney, and the Attorney General, we have no difficulty in concluding that the district court is confined within the scope of 'judicial Power.' Interstate Commerce Commission v. Brimson, 154 U.S. 447," 350 U.S. at 434.


The present statute, drafted with Ullman in mind (see Working Papers at 1408) avoids serious constitutional problems by giving the Court no discretion to deny the immunity a Congressional body requests if the procedural prerequisites are met.

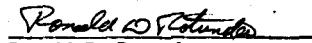
CONCLUSION

For the above reasons, the Application for an order conferring immunity upon and compelling testimony and producing of information from Jeb Stuart Magruder should be granted.

Respectfully submitted,

  
Samuel Dash  
Chief Counsel

  
James Hamilton  
Assistant Chief Counsel

  
Ronald D. Rotunda  
Assistant Counsel

May 31, 1973

## CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 31st day of May, 1973, I served a copy of the attached Supplemental Memorandum of Law on the Honorable Elliot L. Richardson, Attorney General of the United States, and on Archibald Cox, special prosecutor, by having said Memorandum hand delivered to their offices in the Main Justice Building, Tenth Street and Constitution Avenue, N.W., Washington, D.C. I also served a copy of said Memorandum upon James Bierbower, Esq., attorney for Jeb Stuart Magruder, by depositing same in a United States Post Office, postage prepaid, addressed to his office at 1625 K Street, N.W., Washington, D.C.

Ronald D. Rotunda  
Ronald D. Rotunda

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Application of :

UNITED STATES SENATE SELECT :  
COMMITTEE ON PRESIDENTIAL :  
CAMPAIGN ACTIVITIES :

Misc. No. 70-73

MEMORANDUM ON BEHALF OF THE SPECIAL PROSECUTOR  
ON APPLICATION FOR ORDERS CONFERRING IMMUNITY

This memorandum is submitted in response to a request that the Attorney General furnish his views regarding the powers and duties of the District Court in acting upon applications by the Senate Select Committee for orders granting immunity and compelling testimony pursuant to 18 U.S.C. 6005. By Department of Justice Order 517-73 (May 31, 1973), the Attorney General delegated to the Special Prosecutor the authority to investigate and prosecute, among others, all offenses arising out of the Watergate matter. Included in this authority is the responsibility for handling applications for immunity.

The Special Prosecutor is of the opinion that the continued conduct of public and televised Senate hearings creates very serious danger: (1) of impeding investigation of the Watergate affair and associated misconduct; (2) of widespread, pre-trial publicity which might prevent bringing to justice those guilty of serious offenses in high government office. The examination of major participants and possible defendants under use immunity

\_\_\_/ We are attaching, for the Court's information, a copy of the letter sent to Senator Ervin by the Special Prosecutor.

will intensify the difficulty of successful prosecution. The Select Committee of the Senate nevertheless rejected a request that hearings be temporarily suspended.

Under these circumstances, the Special Prosecutor deems it inappropriate to raise technical obstacles to the Select Committee's further conduct of the hearings. At the same time, this Court has a duty to consider steps within its power to insure both the integrity of grand jury proceedings and the fairness of any trial upon indictments resulting therefrom. We, as officers of the Court, have an obligation to advise the Court upon its powers, as we understand them, and also upon the circumstances affecting its exercise of discretion.

In our view, these are the applicable principles:

1. Once the express conditions set forth in 18 U.S.C. 6005 are met, unconditional denial of any order to testify under immunity would be beyond the Court's discretion. Subject only to some question whether John Dean is a witness within Section 6005(a) who "refuses to give or provide testimony on the basis of his privilege against self-incrimination," we believe the express conditions have been satisfied.
2. Although the matter is certainly not free from doubt, we believe the Court has power to condition any order granting immunity upon measures safeguarding the integrity of grand jury investigations and the fairness of any resulting trials for criminal offenses.
3. From the standpoint of the integrity of grand jury proceedings and the fairness of any subsequent trials, the most appropriate order would be one requiring the testimony to be taken in executive session without subsequent publication. Bearing in mind the decision of the Select Senate Committee to push forward with public hearings, the most appropriate condition would seem to be the exclusion, during the giving of compelled, self-incriminatory testimony, of live or recorded radio, television, and other coverage not permitted at a criminal trial.

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/ The Special Prosecutor would also seek from time to time to persuade the Select Committee to accommodate its hearings to the needs of criminal investigation and prosecution.

I. The District Court Has No Power to Deny,  
Unconditionally, Issuance of the Requested Order.

The Select Committee's request is presented under 18 U.S.C. 6005. Both the language of the statute and its history make clear that, once all statutory prerequisites have been met, the Court cannot deny, unconditionally, a request for an order granting immunity. Section 6005(a) directs that a district court "shall" issue the requested order compelling testimony, if the various statutory conditions are met. The legislative history also demonstrates an intent that the decision to request an order should not be questioned. See Senate Report at 146; cf. Ullman v. United States, 350 U.S. 422, 433-34.

The statute contains a number of explicit requirements upon which this Court's power to issue the order is predicated. We assume that all of these requirements have been met, but the record is unclear on one point. Section 6005(a) requires some evidence that the witness will invoke his Fifth Amendment privilege. On June 3, 1973, a news story appearing in the Washington Post reported that Mr. Dean has indicated his willingness to testify before the Committee whether or not he is granted immunity. The record should be clear on this point.

II. The District Court Has Power to Impose Conditions Upon  
a Grant of Immunity So As to Reconcile and Further the Purposes of  
Section 6005 and to Safeguard the Integrity of Criminal Proceedings.

A. It is by no means clear that section 6005 would be constitutional if it required a court to issue orders compelling testimony at Congressional request without granting the court, at the same time, the power to impose protective conditions where these were necessary. There is certainly language in Kilbourn v. Thompson, 103 U.S. 168, 193094 (1880) suggesting that Congress

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✓ We have no indication as to whether Mr. Magruder intends to claim his privilege as a basis for refusing to testify. He has testified at some length before the grand jury.

could not properly compel testimony where to do so would be "to interfere with a suit pending in a court of competent jurisdiction." Fortunately this Court need not reach any such issue, for analysis of the purposes of, and precedent related to 18 U.S.C. 6005 suggest a statutory intention to permit such judicial conditions.

Section 6005 of Title 18 and its legislative history reflect three basic Congressional policies: providing the Congress with access to needed testimony; protecting, at the same time, the Fifth Amendment rights of witnesses; and avoiding any unnecessary interference with prosecution for crimes against the laws of the United States. Where the terms and context of a particular request for immunity unnecessarily impinge upon one of the three basic purposes of the statute, we believe the Court has power to condition a grant of immunity on steps designed to reconcile these basic purposes.

The language of the section is silent on the subject of such conditions, and our research into the legislative history has uncovered no consideration of the question; but precedent under closely related statutes suggests that such power exists. For example, in several instances courts dealing with immunity requests under related statutes have held that the order to testify under a grant of immunity can be conditioned upon compliance with other procedures designed to serve the statutory purpose of assuring adequate protection of the witness's Constitutional rights.

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/ The Court stated (at 193-194): "The case being one of a judicial nature, for which the power of the courts usually afford the only remedy, it may well be supposed that those powers were more appropriate and more efficient in aid of such relief than the powers which belong to a body whose function is exclusively legislative."

/ See Bursey v. United States, 466 F.2d 1059, 180-1081 (C.A. 9) (in connection with immunity grant under 18 U.S.C. 2514, court may order government to allow witnesses to inspect and copy transcript of his testimony); In re Minkoff, 349 F. Supp. 154 (D. R. I.) (court conditioned an order compelling testimony under 18 U.S.C. 6003 on the government's agreement to prepare a transcript of the testimony and provide it to the witness); In re Russo, 53 F.R.D. 564 (C.D. Cal.) (court ordered provision of transcript in connection with grand jury testimony compelled under 18 U.S.C. 2514).

B. There can be no doubt that one of the fundamental purposes of Section 6005 was to avoid immunizing guilty parties from prosecution and conviction so long as this was unnecessary to Congress' obtaining the information needed for the proper discharge of its legislative responsibilities. Prior to enactment of the "use immunity" statute under which these orders are being requested, federal compelled-testimony statutes conferred "transactional immunity," shielding a witness completely against prosecution for any matter respecting which he had given compelled testimony. That result was thought to be required by the decision of the Supreme Court in Counselman v. Hitchcock, 142 U.S. 547. However, following the decision in Murphy v. Waterfront Commission, 378 U.S. 52, which dealt with interjurisdictional immunity, it became apparent that it might be constitutionally permissible to compel testimony without automatically immunizing the witness from all prosecution, a proposition subsequently confirmed by the recent decision of the Supreme Court in Kastigar v. United States, 406 U.S. 441, upholding the validity of the legislation under which this Court is asked to act.

Thus, a fundamental policy underlying the enactment of 18 U.S.C. 6001-6005 was a Congressional judgment that the ability to prosecute witnesses on the basis of evidence wholly independent of their compelled testimony should be preserved. See Senate Report, pp. 53-55. As Senator McClellan, the principal sponsor of this legislation, advised the Senate (Cong. Rec. S. 2638 (daily ed. , March 11, 1969)):

If the underlying premise of Counselman -- that there is no way to protect the witness from the derivative use of his compelled testimony -- has indeed been rejected, it seems clear that granting immunity from prosecution rather than use of testimony is no longer constitutionally compelled on any level, State or Federal. Giving immunity where it is not necessary is giving an unnecessary gratuity to a crime, a step no sane society ought ever to take.

C. The Ninth Circuit and the District Courts in Rhode Island and California found that they had the power to impose conditions designed to serve one of the three basic purposes of statutes very similar to 18 U.S.C. 6005: protecting Fifth Amendment rights against unnecessary risks associated



with absence of a transcript. This Court has the analogous power to impose conditions designed to preserve, against unnecessary risks associated with widespread publicity, the statutory purpose of not taking, in Senator McClellan's words, "a step no sane society ought ever to take": "giving an unnecessary gratuity to a crime." Such conditions on any grant of the Select Committee's request are essential to preserve the purposes of Congress in this case. In the absence of conditions restricting the publicity accorded statements compelled by this Court, it now appears likely that the testimony will be carried on nation-wide television, reaching into millions of homes. While it is impossible to judge at this time the precise impact of this publicity on the conduct of the forthcoming cases, there is, at the least, a significant possibility that the Committee's proceedings will imperil the government's ability to empanel an unbiased jury for the trial of any offenses charged. Cf. Delaney v. United States, 199 F.2d 107 (C.A. 1).

The proposed testimony would raise difficulties exceeding even the traditional problems associated with pre-trial publicity, since what is expected is the dramatic, broadcast confessions of these witnesses, implicating themselves and others in a variety of criminal acts. This compelled, incriminating testimony would, of course, be inadmissible at trial against the witnesses. Cf. Miranda v. Arizona, 384 U.S. 436. Its availability to prospective jurors prior to trial might make it impossible to provide a fair trial at all. See Rideau v. Louisiana, 373 U.S. 723. If the anticipated publicity is given to the testimony of these witnesses, "the risk that the jury [that may be called upon to try them and others] will not, or cannot, follow instructions [to disregard the extra-judicial confessions] is so great, and the consequences of failure so vital\*\*\* that the practical and human limitations of the jury system cannot be ignored." Bruton v. United States, *supra*, 391 U.S. at 135.

At least in the absence of an express waiver by a witness of objections to pre-trial publicity flowing from national television coverage, the result of an unconditional grant of "use immunity" in this matter, therefore, may well be the award of complete amnesty to these witnesses and all those who

acted in concert with them. This consequence would stand on its head the very statute under which the Committee makes its request - a statute intended to eliminate the complete freedom from criminal liability associated with "transaction" immunity. The Court need not assume that Congress, which said nothing to preclude the imposition of judicial conditions, intended to authorize a Committee to impose grave risks of barring all future prosecution of the witness called. Certainly no such assumption is warranted when judicial conditions on the grant of immunity, limiting the amount of publicity that can be accorded the testimony of the immunized witness, does not interfere with any other of the basic purposes of the immunity statute. The Select Committee remains free, as Congress intended, to receive the witness' testimony and to make full and effective use of that testimony in the legislative process. Nor are the witness' Fifth Amendment rights in any way abridged by restricting the publicity that can be given his statement. Conditions restricting pre-trial publicity will, in sum, reduce substantially the risk of "giving an unnecessary gratuity to a crime" without impinging significantly on Congress' other purposes in passing 18 U.S.C. 6005.

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/ See, in this regard, the Supreme Court's decision of May 29, 1973, in Doe v. McMillan, reported at 41 L.W. 4752.

D. Wholly apart from the need to impose protective conditions in order to preserve the objectives of the "use immunity" statute itself, grant of the protective relief we request is consonant with long established and well recognized principles of judicial power and responsibility to preserve the integrity of criminal trials. "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." McNabb v. United States, 318 U.S. 332, 340; Jenks v. United States, 353 U.S. 657; Hill, The Bill of Rights and The Supervisory Power, 69 Colum. L. Rev. 181, 214.

Speaking in the context of inflammatory pre-trial publicity, the Supreme Court and the courts of appeals have emphasized the absolute necessity for the exercise of these supervisory powers. The Supreme Court has described the right to a fair trial as "the most fundamental of all freedoms" which "must be maintained at all costs" (Estes v. Texas, 381 U.S. 532, 540-541), and has directed the trial courts to take all necessary action to "protect their processes from prejudicial outside interferences" which pre-trial publicity may inject into criminal proceedings. Sheppard v. Maxwell, 384 U.S. 333, 363. See also ABA Standards Relating to Fair Trial and Free Press, 54 A.B.A.J. 347, 350.

Moreover, while many of the cases speak of the necessity of protecting a defendant's ability to obtain a fair trial, the government has an equal interest in this worthy objective. As the court of appeals observed in United States v. Tijerina, 412 F.2d 661, 666 (C.A. 10), certiorari denied, 396 U.S. 990, affirming the contempt conviction of two defendants who violated an order against making public statements (412 F.2d at 666):

The public has an overriding interest that justice be done in a controversy between the government and individuals and has the right to demand and expect 'fair trials designed to end in just judgments.' Wade v. Hunter, 336 U.S. 684, 689; 69 S.Ct. 834, 837; 93 L. Ed. 974; and Mares v. United States, 10 Cir., 383 F.2d 805, 808 and 809. This objective may be thwarted unless an order against extrajudicial statements applies to all parties to a controversy. The concept of a fair trial applies both to the prosecution and the defense.

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Under Article III, Section 2 of the Constitution, there is established a general policy that the "Trial of all Crimes, except in cases of Impeachment, shall be by Jury" and the government's right to insist on a trial by jury -- a fair and impartial jury, of course -- is confirmed by Rule 23(a), Fed. R. Crim. P. See Singer v. United States, 380 U.S. 24.

Estes v. Texas, supra, is particularly relevant in the present context. In Estes, the Supreme Court invalidated a state criminal conviction because the proceedings had been televised. The Court specifically ruled that there was no First Amendment impediment to exclusion of radio and television broadcasters where it is necessary to preserve the integrity of official proceedings. "While maximum freedom must be allowed the press in carrying on its important function in a democratic society its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process." 381 U.S. at 539.

The Supreme Court echoed this same theme in Sheppard v. Maxwell, supra, where the trial court was held to have erred in concluding that "it lacked power to control the publicity about the trial." 384 U.S. at 357. The Court ruled that trial courts have an obligation to use imagination and discretion in regulating press coverage (384 U.S. at 358), in preventing witnesses from discussing their testimony with the press (384 U.S. at 359) and in controlling "the release of leads" by the "witnesses, and the counsel for both sides" (ibid). The Court summarized its approach as follows (384 U.S. at 363):

But we must remember that reversals are but palliatives: the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interference.

In the present matter, the Senate Committee, by invoking this Court's jurisdiction and seeking the exercise of the judicial process to confer testimonial immunity, clearly has subjected itself to acceptance of reasonable conditions designed to accommodate the fundamental constitutional interests at stake. Cf. Krippendorf v. Hyde, 110 U.S. 276, 283. The proposed public testimony of the witnesses Dean and Magruder on nationwide television would in all likelihood present a clear and present danger (1) to the ability of other persons whom they may implicate to obtain a fair trial, (2) to the validity of any indictments which are handed up during the period,

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—/ Compare Delaney v. United States, 199 F.2d 107, 111-112 (C.A. 1) and Silverthorne v. United States, 400 F.2d 627, 633 (C.A. 10).

and (3) to the ability of the government to prosecute these particular witnesses who may be making confessions on nationwide television which should not be used against them at trial. See Rideau v. Louisiana, 373 U.S. 726.

While, ordinarily, techniques which "include continuance, change of venue, sequestration of the jurors, sequestration of witnesses, voir dire of prospective jurors and cautionary instructions" may suffice to avoid the effects of pre-trial publicity, "in many cases, particularly those of a highly sensational nature, the use of these traditional procedures has not proven sufficient to assure the defendant a fair trial. Moreover, some of them will involve additional complications such as, in the case of a protracted continuance, prejudice to the right of a defendant to a speedy trial and the interest of the public in the prompt administration of justice."

Report of the Judicial Conference Committee on the Operation of the Jury System on the "Free Press Fair Trial" Issue, 45 F.R.D. 391, 413.

The Court here has the opportunity and, we respectfully submit, the responsibility to take reasonable preventive action essential to the public interest in insuring a fair and prompt disposition of most serious criminal charges, particularly since such action will at the same time vindicate the legitimate Congressional interest in obtaining information essential to its legislative function.

It is true that the imposition of protective conditions to guard against prejudicial publicity concerning the compelled testimony of witnesses Dean and Magruder will restrict the latitude of the Committee in publicizing some of its activities. But it is the Committee which has asked to use the Court's process in this case and it thereby necessarily subjects itself to reasonable conditions under long-established principles. The recent decision of the Supreme Court in Doe v. McMillan, No. 71-6356, 41 U.S. L.W. 4752 (decided May 29, 1973), lays to rest doubts about the constitutional propriety of judicial action to block publication of Congressional reports

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/ It is fundamental that a federal court has both the inherent power and the positive "duty to prevent its process from being abused to the injury of third persons"; "\* \* \* the equitable powers of courts of law over their own process to prevent abuse, oppression, and injustice are inherent and equally extensive and efficient, as is also their power to protect their own jurisdiction \* \* \*." Krippendorf v. Hyde, 110 U.S. 276, 283. This inherent power is now codified in the All Writs Act, 28 U.S.C. 1651, which authorizes the federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

and activities beyond the needs of the legislative process. In McMillan, where even injunctive relief was sought, the Supreme Court determined that neither the Speech and Debate Clause, nor the principle of separation of powers, nor the doctrine of official immunity barred this Court from preventing a Congressional committee, its staff, and other officials from publishing certain information that Congress had an interest in developing as part of the legislative process but did not have a protected interest in disseminating to the public. In speaking of its own history of involvement in this area, the Supreme Court noted (41 U.S.L.W. at 4756 n.12):

While an inquiry such as is involved in the present case, because it involves two coordinate branches of Government, must necessarily have separation of powers implications, the separation of powers doctrine has not previously prevented this Court from reviewing the acts of Congress, see, e.g., Kilbourn v. Thompson, supra (103 U.S. 163); Dombrowski v. Eastland, supra (387 U.S. 82); even when the Executive Branch is also involved, see, e.g., United States v. Brewster, supra (408 U.S. 501); Gravel v. United States, supra (408 U.S. 606).

See also Powell v. McCormack, 395 U.S. 486.

### III. The Conditions Which the Court Should Consider Imposing.

In view of the foregoing analysis, we believe it would be appropriate for the Court to impose reasonable conditions on the orders granting immunity in these cases -- conditions designed to accommodate the Committee's need for the testimony of these witnesses with the legislative policy underlying the "use immunity" statute, the public interest in criminal justice, and the rights of potential defendants. Among the alternatives that have either been approved by the Supreme Court or adopted by other federal courts in somewhat similar contexts are the following:

1. Requiring, as in the case of criminal trials, the exclusion of the broadcast media (radio and television), when an immunized witness is required to furnish self-incriminating testimony, at least in the absence of an express waiver by the witness and his counsel of any objection to such potentially prejudicial coverage.

2. Limiting the grant of an order directing the witness to testify before the Committee to testimony given in executive session.

3. Conditioning the grant of the Committee's application on the assurance that it will receive the testimony only in executive session and will not release the transcript of the testimony or any summary of it pending completion of the Committee's investigation.

4. Supplementing one or more of the above by directing the witnesses not to discuss or comment upon their testimony with members of the press or with any persons other than their counsel, members of the Committee and its staff, and prosecuting officers of the Department of Justice.

5. Supplementing one or more of the above by conditioning the grant of immunity on an understanding that the Committee and its staff will not make public statements about the witnesses' testimony pending completion of the Committee's investigation.

This listing of possible conditions is not intended to be exhaustive; nor do we suggest that each of these conditions would be appropriate in this case. We do contend that the plain purposes of 18 U.S.C. 6005 would be furthered by some such conditions; that the judicial authority found in the immunity statute itself is supplemented by the Supreme Court's decisions in cases like Doe v. McMillan, supra, Dombrowski v. Eastland, supra, and Powell v. McCormack, supra, establishing the Court's power to require such protective action; and, finally, that under the decisions in Sheppard and Estes the Court may have an obligation to tailor some form of order that will protect the integrity of the criminal justice process. As we have indicated above, from the standpoint of the integrity of grand jury proceedings and the availability and fairness of subsequent trials, the proper condition might require the use of executive sessions. But, in light of the decision of the Select Senate Committee to push forward with public hearings, the most appropriate

condition would seem to be the exclusion, during the giving of compelled, self-incriminating testimony, of live or recorded radio, television, and other coverage not permitted at a criminal trial. —/

Respectfully submitted.

ARCHIBALD COX  
Special Prosecutor,  
Watergate Special Prosecution Force,  
Department of Justice,  
1425 K Street, N.W.,  
Washington, D.C. 20005

JUNE 6, 1973.

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—/ This is much the position adopted by the American Bar Association in 1952 and 1954. See 77 ABA Reports 429.



WATERGATE SPECIAL PROSECUTION FORCE  
United States Department of Justice  
1425 K Street, N.W.  
Washington, D.C. 20005

June 4, 1973

Honorable Sam J. Ervin  
Chairman  
Select Committee on Presidential  
Campaign Activities  
United States Senate  
Washington, D. C.

Dear Senator Ervin:

I am writing you as Chairman of the Select Committee on Presidential Campaign Activities to urge the national importance of at least temporarily suspending public hearings. The continuation of hearings at this time would create grave danger that the full facts about the Watergate case and related matters will never come to light, and that many of those who are guilty of serious wrongdoing will never be brought to justice.

I am not suggesting that the hearings now be called off. I am urging that the Special Prosecutor be given time to assess this enormously complex case and to advise the Select Committee about the consequences of the appearance of particular witnesses at televised hearings.

I

Today, we all face a new situation -- which requires new thought. When the Select Committee began its hearings, the Executive Branch had not undertaken an exhaustive investigation with adequate resources. Now a Special Prosecutor has been given full authority, the assurance of adequate resources, and absolute independence in investigating and prosecuting not only the Watergate affair but also all other offenses during the 1972 Campaign and all allegations against the President, members of the White House staff, and Presidential appointees. I have pledged myself to pursue every avenue of investigation wherever it leads.

- 2 -

The creation of a Special Prosecutor was largely the work of the Senate, including the Select Committee. The Select Committee and I have the same goals: to get at the truth whatever it may be, to have the truth brought out in public fairly and responsibly, and to restore public confidence in the integrity and capacity of our governmental institutions. I have the additional duty of prosecuting the wrongdoers.

## II

My reasons for believing that a suspension of the hearings will promote our mutual goals fall into four groups:

1. Immediate public hearings will impede investigation. They make it impossible to get at the truth from bottom to top.

(a) Witnesses often come forward with testimony because of fear of heavy prison sentences. Additional publicity through televised hearings will relieve this fear by increasing the chance that pre-trial publicity will forestall successful prosecution, and this will, in turn, reduce the chance of getting truthful testimony. The pressure on witnesses to tell the truth would also be diminished by the other impediments to successful prosecution (discussed below) that may result from immediate continuation of hearings.

(b) Premature disclosure of testimony and other leads in the possession of investigators aids anyone disposed to fabricate explanations, and it increases the difficulty of getting truthful information from potential witnesses.

(c) Witnesses torn between conscience, on the one hand, and awe of office or loyalty to superiors, on the other, are likely to be more willing to give information to the Special Prosecutor than to make full disclosure in front of television cameras.

(d) I have been assured of access to all documents, files and other papers in the Executive Branch. This assurance, plus the determination to publicize any withholding, gives my office great power to develop evidence of this character.

- 3 -

2. Public hearings prior to the further development of the investigation will increase the risk that major guilty parties will go unpunished. Quite possibly, all would go free.

Each of the points made above supports this proposition. There are two additional, important considerations: (1) the danger that pre-trial publicity will prevent fair trials from ever being held; (2) the risk that the Committee's granting immunity to major potential defendants will bar successful prosecution. Prosecution of a Senate witness may be impossible if he testifies under use immunity before a record can be made by the Special Prosecutor demonstrating that the case was developed without leads from the immunized testimony.

There is much more to this question than whether one or two people go to jail. Confidence in our institutions is at stake. We must find a way both to expose the truth and to punish the wrongdoers. Failure to convict persons in high office shown guilty of crime -- even as a consequence of Senate hearings -- could well shatter public confidence in our governmental institutions, particularly confidence in our system of justice. At a time when the Nation's concern about crime has focused attention on our system of justice, it would be discriminatory and therefore demoralizing for the powerful to go scot-free while ordinary citizens are sentenced to prison.

3. Both the Senate Committee and the Special Prosecutor should preserve, for the present, freedom to bring out at one time and in a comprehensive presentation all the facts concerning the President of the United States.

Allegations have been made concerning the implication of the President of the United States. It seems unlikely that all the facts are known and all the available evidence has been assembled. There is grave danger of confusion if bits and pieces emerge from day to day or week to week. This method of disclosure also makes it more difficult to develop additional information.

- 4 -

I do not now know what facts will develop or the best place, time or procedure for a comprehensive presentation. Perhaps it is before the Select Committee. Quite possibly it will turn out that no such presentation can be made, and that the Senate should later resume its hearings as planned. My only point is that, for the present, this option should be preserved.

4. We should also remember that innocent persons can be questioned and exonerated within the confines of grand jury secrecy while even the most careful public hearing may injure the innocent.

### III

I must emphasize that I am not requesting -- and have never requested -- the Select Committee immediately to call off all hearings. My only request is that the Committee -- having forced a broad, vigorous and independent investigation -- now enable the Special Prosecutor to pursue his responsibilities unimpeded until an appropriate time for reviewing the situation together and deciding in cooperation how next to proceed.

It is very difficult to specify the exact amount of time needed before discussing the problem again with the Select Committee. Three months seems reasonable, but I would be grateful for any significant period. The more time I can have, the more accurately I can later advise the Select Committee on the likely effect of resumption of the hearings upon the full development of information and the best way to assure the possibility of fair trials. I would expect, of course, to keep the Select Committee advised of the general progress of our work.

I realize that this is a very trying request to put to the Select Committee because granting it might give rise to unwarranted charges that the Committee was delayed or diverted in bringing out the truth. It is an even more difficult request for me to make because there will be false charges that I am attempting to cover up the truth.

- 5 -

Only the conviction that the above points have critical importance induces me to write this letter -- and to hope that upon full consideration the Select Committee will grant my request.

If you think it useful, I would value the opportunity to explore these points with the Select Committee in Executive Session in more detail.

Sincerely,

*Archibald Cox*

ARCHIBALD COX  
Special Prosecutor

Copy to Senator Edward J. Gurney  
Senator Howard H. Baker, Jr.  
Senator Herman E. Talmadge  
Senator Daniel Inouye  
Senator Joseph M. Montoya  
Senator Lowell P. Weicker, Jr.

Copy also to members of Senate Judiciary Committee

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

FILED

JUN 7 1973

JAMES F. DAVEY  
CLERK

In the Matter of the Application of :

UNITED STATES SENATE SELECT  
COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES

Misc. No. 70-73

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
APPLICATIONS FOR ORDERS CONFERRING IMMUNITY UPON AND COMPELLING  
TESTIMONY AND PRODUCTION OF INFORMATION.

I. INTRODUCTION

The Special Prosecutor seeks to persuade this Court not only to violate the clear terms of the immunity statute under consideration (18 U.S.C. § § 6002, 6005), but also to ignore the Constitutional doctrine of separation of powers. His extraordinary request should be denied.

The Special Prosecutor admits --- as he must --- that the immunity statute gives the Court no power to deny a Select Committee request for immunity that is attended by the required procedural regularities. He contends, however, that this Court has power to impose severe conditions to the immunity grant that would impinge upon basic Committee prerogatives and perhaps debilitate its effectiveness.

If the Special Prosecutor's position were accepted, the testimony of critically important witnesses would be excluded from public view. It was, however, the judgement of a unanimous Senate and a unanimous Select Committee that, at this time of crisis in government, there is a pressing need not only to explore remedial legislation, but also for full public scrutiny of all the facts relating to the Watergate scandal. There can be no doubt that a basic function of Congressional hearings is to inform the populace of corruption in government. As the

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Supreme Court stated in Watkins v. United States, 354 U.S. 178, 200 (1957):

"[There is a] power of the Congress to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government. That was the only kind of activity described by Woodrow Wilson in Congressional Government when he wrote: 'The informing function of Congress should be preferred even to its legislative function.' Id., at 303. From the earliest times in its history, the Congress has assiduously performed an 'informing function' of this nature."<sup>1</sup> (emphasis added).

Indeed, the informing process is a necessary concomitant to the enactment of legislation; it is a well recognized fact of the legislative process that legislation lacking popular support rarely survives.

It is the Select Committee's view that the Special Prosecutor's bold attempt to employ the immunity statute to impose on this Committee his own views as to the proper conduct of Congressional hearings flies in the face of the statutory language, does violence to its legislative history, is not supported by the relevant case law, and raises serious Constitutional problems of separation of powers that this Court has a duty to avoid. Moreover, this Committee rejects the Special Prosecutor's dire predictions that its proceedings will prevent

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1. President Wilson's discussion continued with the following significant observation:

"The argument is not only that discussed and interrogated administration is the only pure and efficient administration, but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration.... It would be hard to conceive of there being too much talk about the practical concerns... of government." Congressional Government (Boston: 1885). 303-304.

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the conviction of guilty parties. To the contrary, we are confident that this Court, by granting appropriate continuances and following the other procedures suggested in Delaney v. United States, 199 F.2d 107 (1st Cir. 1952), and its progeny, can devise means by which the right of fair trial for all concerned can be secured.



## II. THE STATUTORY LANGUAGE

Section 6005 is unambiguous. It expressly provides that, where the procedural prerequisites are met, the Court "shall issue" the immunity order. Nowhere in the statute is there the faintest suggestion that the Court may impose conditions upon the grant of the order. The Special Prosecutor himself concedes that Section 6005 offers no support to his position. The statute does impose one qualification on the issuance of the order. The Attorney General (as he has done in the cases of John Dean and Jeb Magruder) can require the Court to defer the issuance of the order up to twenty days from the date the request was made. It is clear from the statutory language that this was the only qualification Congress intended and the explicit recognition of this qualification precludes the appendage of any qualifications on the order not expressly allowed by the statute.

When this statute was enacted in 1970, Congress was quite aware that Committee hearings could well be conducted before television cameras and the writing press, and thus be widely publicized. Surely, if Congress had intended that immunity grants connected with hearings of extreme public interest be made conditional on restricting or prohibiting televised hearings, then it would have so provided in the statute.

### III. THE LEGISLATIVE HISTORY

That the Court, under sections 6002 and 6005, has no power to condition a grant of immunity is also completely clear from the statute's legislative history. The Special Prosecutor states that he finds no support for his unique theory in the legislative history, but he neglects to inform that, far from being silent on the issue, the legislative history plainly indicates that conditional grants are unauthorized.

The working papers of the National Commission on Reform of Federal Criminal Laws (whose draft statute formed the model for the statute under consideration) state, at 1440, that the Congressional immunity statute was drafted to avert "problems both of constitutionality and of insufficiency of information for meaningful judicial scrutiny . . . . by making the court's function a weak and paltry thing --- ministerial, not discretionary in nature." (emphasis added) We fail to perceive how a statute, which makes the Court's function "a weak and paltry thing," permits the Special Prosecutor to divine some extraordinary power of the Court to control the internal procedures of a Select Committee established by a coordinate branch of government.

It appears to be the Special Prosecutor's notion that, because the Select Committee under the statute must come to the Court for the immunity order, the Court somehow has jurisdiction to impose conditions on the conduct of the Committee's business. The Working Papers (at p. 1408) belie such a conclusion. It is clear that Congress intended to remove the Court from all determinations (excepting those regarding procedural regularity) in the Congressional immunity context:

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"An immunity grant is not a matter of right or wrong, but a discretionary governmental act. The Federal district court may of course scrutinize the record to make certain that the congressional request for an immunity order is jurisdictionally and procedurally well founded, and that the Attorney General has been notified. But if the Attorney General should oppose the congressional request for an immunity order solely because he feels it is "unwise," the court would have no constitutional or other legal basis for siding with the Congress, siding with the Attorney General, or making its own calculation of the degree of public need for the information, balanced against the loss of the possible opportunity to prosecute a possible criminal." Working Papers at 1417. (emphasis added)

The Working Papers go on to make plain that the statute, by eliminating any discretion on the Court's part, was devised to obviate "a conflict between congressional and executive policy concerning granting immunity to a congressional witness [that] the Court would have no basis under our separation of powers system for deciding." Patently the Special Prosecutor's recommendations would, contrary to the legislative purpose, place the Court "squarely in the middle" "of an open conflict between the Attorney General [through his Special Prosecutor] and the Congress on an issue of policy." See Working Papers at pp. 1408-9.\*

\*It is worthy of note that Congress, in 1970, basically expanded rather than restricted its immunity power since previous to that time it could obtain immunity only in national security cases. See Working Papers at 1406. The immunity prerogatives of the Attorney General, however, were diminished being reduced from transactional to use immunity.

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#### IV. THE CASE LAW

Decisional authority also supports the Committee's contentions regarding lack of authority to condition an immunity grant.

While the Special Prosecutor (at p. 3) acknowledges the Supreme Court's decision in Ullmann v. United States, 350 U.S. 422 (1956) (Frankfurter, J.) he fails to deal with the problems its holding creates for his legal theory. In Ullmann a potential witness sought to have the Court reject a request for an immunity order put forth by the Attorney General. Although the Ullmann statute required the immunity order to be in the "public interest," the Court (per Justice Frankfurter) held that the judicial branch had no discretion to deny the order if the procedural prerequisites were met. Quoting District Judge Weinfeld, the Court stated that an interpretation giving the Court discretion would "raise a serious constitutional question under the doctrine of separation of powers." Id. at 433.<sup>1</sup>

1. As the National Commission's Working Papers (p. 1418-9) make clear, Ullmann holds that a district court is "simply to certify" that the statutory requirements have been met. The court "is not to exercise any independent judgement on the merits of granting immunity." Under the present statute, courts should "continue to view their role here as being solely ministerial --i.e.; service as a recording agency. This approach was outlined in the leading case of Ullmann v. United States, 350 U.S. 422 (1956)...." Id. at 1435.

The National Commission, in fact, wondered whether the then proposed immunity statute should allow any role for the Court at all: it concluded that a deletion of the requirement of a congressional application to the Court "would not sacrifice any vital interest," but "the retention of the requirement is harmless as long as district courts respect the Ullmann principle." Id. at 1442.

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The Special Prosecutor's interpretation of the instant statute, which was carefully drawn with Ullmann in mind,<sup>1</sup> would allow a Court discretion to place its conditions on the internal workings of a legislative committee. We submit that, after, Ullmann, the Special Prosecutor's interpretation is indefensible.

Oddly enough, the Special Prosecutor offers (pp.6,9) only casual reference to Delaney v. United States, 199 F.2d 107. (1st Cir. 1952), the leading case involving pretrial publicity provoked by a congressional hearings. After Delaney was indicted on matters relating to the administration of the Internal Revenue laws, he was subjected to adverse publicity by hearings dealing with tax matters conducted by the so-called King sub-committee. The Circuit Court reversed Delaney's conviction because of the District Court's failure to grant such a continuance, but noted that this indictment could still stand and that, with an appropriate continuance, Delaney could have received a fair trial. The Court stated further:

"We mean to imply no criticism of the King Committee. We have no doubt that the Committee acted lawfully, within the constitutional powers of Congress duly delegated to it. It was for the Committee to decide whether considerations of public interest demanded at that time a full dress public investigation / of Delaney." Id. at 114.  
(emphasis supplied)

The Court emphasized that the Delaney case involved an individual already under indictment. In a statement that portends the present situation, the Court said:

"We limit our discussion to the case before us, and do not stop to consider what would be the effect of a public legislative hearing, causing damaging publicity relating to a public official not then under indictment. Such a situation

1. See, p. 7, supra, note 1.

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may present important differences from the instant case. In such a situation the investigative function of Congress has its greatest utility: Congress is informing itself so that it may take appropriate legislative action; it is informing the Executive so that existing laws may be enforced; and it is informing the public so that democratic processes may be brought to bear to correct any disclosed executive laxity. Also, if as a result of such legislative hearing an indictment is eventually procured against the public official, then in the normal case there would be a much greater lapse of time between the publicity accompanying the public hearing and the trial of the subsequently indicted official than would be the case if the legislative hearing were held while the accused is awaiting trial on a pending indictment." Id. at 115. (emphasis added.)

The language of Delaney provides compelling support for the Select Committee's present hearing; indeed it is our view that we would be unpardonably remiss if, in this time of national emergency, we did not push forward to full revelation of the facts. We also note, in this regard, that further indictments in the Watergate Case are not expected for three months and that consequently trial must be six months to a year away, thus minimizing the effect of pretrial publicity at this time.

The cases that follow Delaney support its reasoning. E.g., United States v. Rosenberg, 200 F 2d 666 (2d Cir. 1952) (Swan, C.J.); United States v. Flynn, 216 F2d 357, 375(2d Cir. 1957) (Harlan, J.,) where the court also noted that there was no proof " as to the extent to which already existing public opinion... was heightened by any of the activities of Government officials and agencies of which complaint is made." ( emphasis added); in this regard, it would appear most unlikely that public information would be reduced if the Select Committee's hearings were placed in Executive Session or other-

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wise interfered with by this Court. Indeed, it is more reasonable to believe that public speculation, as opposed to informed opinion, would increase. Beck v. United States, 298 F2d 622, 628 (9th Cir. 1962). In the recent case of Silverthorne v. United States, 400 F 2d 627, 633-4 (9th Cir. 1968) the Court said:

"The Senate investigation was, among other things, initiated for the purpose of informing the Executive so that existing laws may be enforced. In this respect the Senate Committee and the federal grand jury are associates in exposing criminal activity and moving towards its curtailment. What illegality the Senate Committee uncovers cannot become the forbidden fruit of the grand jury's consideration merely because in the process of uncovering, prejudice to the perpetrator may accrue." (emphasis added).

In his concurring opinion in Hutcheson v. United States, 369 U.S. 599 (1962)<sup>1</sup> Justice Harlan observed:

"...[S]urely a congressional committee which is engaged in a legitimate legislative investigation need not grind to a halt whenever responses to its inquiries might potentially be harmful to a witness in some distinct proceeding...or when crime or wrong doing is disclosed. McGrain v. Daugherty, 273 U.S. 135, 179-180." 369 U.S. at 618 (emphasis added).

\* \* \*

"Nor can it be argues that the mere pendency of the state indictment ipso facto constitution-

1. This case, in which the witness before the Congressional Committee was already under indictment in a state court, was argued (and won) for the government by Solicitor General Cox.

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ally closed this avenue of interrogation to the / Congressional / Committee." Id. at 613.

Finally, see Hearst v. Black, 87 F 2d 68, 71-72 (D.C.

Cir. 1936):

"If a court could say to the Congress that it could use or could not use information in its possession, the independence of the Legislature would be destroyed and the constitutional separation of the powers of government invaded. Nothing is better settled than that each of the three great departments of government shall be independent and not subject to be controlled directly or indirectly by either of the others." (Emphasis added).<sup>1</sup>

Cf. Mississippi v. Johnson, 4 Wall. 475 (1886).

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1. We suggest to the Court that our Committee, as it has already, will take all appropriate steps to insure that ours is a dignified hearing that does not unduly prejudice those who may be eventually indicted. We submit that, because we are a committee of a separate branch of government, the responsibility for determining how we run our business rests with us rather than the Special Prosecutor. In his only request to the Committee, the Special Prosecutor asked that the hearings be recessed. He did not recommend any of the conditions he now asks this Court to impose on the Select Committee. A copy of the Committee's resolution and rules is appended to this memorandum.



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The cases and materials upon which the Special Prosecutor chooses to rely are, for the most part, irrelevant and, in any event, totally unpersuasive.

The references (pp. 4,5) to cases in which courts have ordered the Department of Justice Attorneys to allow witnesses to copy and inspect transcripts of their testimony are inapplicable. Such cases did not confront separation of powers problems.

The Special Prosecutor's reference (pp. 8-10) to Sheppard v. Maxwell, 284 U.S. 333 (1966), and related cases, and the ABA Standards Relating to Fair Trial and Free Press, ignores several important facts. First, all of these authorities must be read in the context of the doctrine of separation of powers. That a court should regulate its own proceeding (as proclaimed in Sheppard) does not mean that it has power to regulate proceedings before a coordinate branch of government. The most the Sheppard case would suggest is that a criminal trial be postponed because of a Congressional hearing; in no way can a power in the court to regulate a Congressional proceeding be squeezed out of its language.<sup>1/</sup>

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<sup>1/</sup> In Sheppard, even after massive pretrial publicity by news media explicitly designed to stir up passion, the indictment was not dismissed. Rather, the trial court was held in error because it did not grant a change of venue, or continuance, or use other judicial devices (e.g., extra preemptory challenges, a careful voir dire of the jurors) to assure a fair trial. Surely the Special Prosecutor is not arguing that one who commits a heinous crime must go free because of the resulting pretrial publicity --- that a Sirhan Sirhan or Charles Manson may not have a fair trial because of the notoriety resulting from their acts. Both such individuals received much publicity; they still received a fair trial and their convictions withstood attack. As noted above, we reject any notion that this Court cannot secure a fair trial for those involved after the Select Committee's hearings.

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The Special Prosecutor's reference to the ABA Standards Relating to Fair Trial and Free Press (Approved Draft, March, 1968) is misleading. None of the recommendations of the Standards are designed to regulate Congressional committee hearings, but were solely intended to apply to court proceedings. For example, although Section 2.1 of the Standards recommends that law enforcement officials adopt certain internal regulations to curb pretrial publicity, Section 2.1 adds a significant exception:

"Nothing in this rule precludes any law enforcement officer . . . from participating in any legislative, administrative, or investigative hearing . . . ."

Other authorities relied on by the Special Prosecutor are equally unpersuasive. Doe v. McMillan, \_\_\_\_\_ U.S. \_\_\_\_\_ (May 29, 1973) (No. 71-6356) (see Mem. pp. 10-12) only holds that in certain limited circumstances involving the privacy of small children there may be a justiciable cause of action against the Government Printing Office printer and the Superintendent of Documents that is not prohibited by the Speech or Debate Clause of the Constitution. To this cause of action the defendants could raise defenses, "constitutional or otherwise." Slip Opinion at 19. However, the fiercely divided Court did appear to be unanimous that the Separation of Powers doctrine protects the Congressional power to hold public hearings. Dombrowski v. Eastland, 387 U.S. 82, 85 (1967) and Powell v. McCormack, 395 U.S. 486 are factually unique cases with holdings not relevant to the present matter. (See Mem. 11-12)<sup>2/</sup>

<sup>2/</sup> Certain citations by the Special Prosecutor are, at best, mystifying. He appears (p.10) to find some solace in the All Writs Act but surely would not contend that this statute overrides the Constitutional doctrine of separation of powers. (Footnote continues on next page.)

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(Footnote continues from preceding page)  
He cites (p.6) Miranda v. Arizona 387 U.S. 436 (1966), a case that would seem singularly irrelevant where a grant of immunity that would prohibit the use of compelled testimony is involved. Finally, reference is made to Kilbourn v. Thompson, 103 U.S. 168 (1881), but this case, which involved a contempt proceeding, only held that Congress may not pry into private affairs beyond the scope of its resolution and without some valid legislative purpose. But see Sinclair v. United States, 279 U.S. 263 (1929). Hutcheson v. United States, 369 U.S. 599 (1962).

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V. CONCLUSION

As we have previously stated to this Court, the present matter deals not only with a statute clear on its face but with a delicate issue of separation of powers. We submit that, in these circumstances, the Court should not tamper with the inter-workings of the legislative process. The requested immunity orders should issue.\*

Samuel Dash (RDR)  
Samuel Dash  
Chief Counsel

James Hamilton (RDR)  
James Hamilton  
Assistant Chief Counsel

Ronald Rotunda  
Ronald Rotunda  
Assistant Counsel

\*To resolve our final issue, counsel for both John Dean and Jeb Magruder have represented to the Committee that their clients, without immunity, will invoke their Fifth Amendment privilege where appropriate; the Committee has so certified to this Court and has received no subsequent representation from counsel for Dean and Magruder to the contrary.

## CERTIFICATE OF SERVICE

I certify that on the 7th day of June, 1973, I so served a copy of the attached Reply Memorandum on the Honorable Elliot Richardson, Attorney General of the United States, on Archibald Cox, Esq., Special Prosecutor, and James Bierbower, Esq. attorney for Jeb Stuart Magruder, by hand delivery. I also served a copy of the attached Reply Memorandum on Charles Shaffer, attorney for John W. Dean III, by depositing the same, postage prepaid, in a United States Post Office.

Ronald D. Potunda

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

FILED  
JUN 8 1973  
JAMES F. DAVEY, Clerk

\_\_\_\_\_  
In the Matter of the Application of :  
: UNITED STATES SENATE SELECT : Misc. No. 70-73  
COMMITTEE ON PRESIDENTIAL :  
CAMPAIGN ACTIVITIES :  
: \_\_\_\_\_

MOTION FOR LEAVE TO FILE  
AMICUS STATEMENT

American Broadcasting Companies, Inc. (ABC), Columbia  
Broadcasting System, Inc. (CBS), National Broadcasting Company,  
Inc. (NBC) and Public Broadcasting Service (PBS) hereby  
respectfully request leave to file the attached Statement as  
amici in connection with this Court's consideration of the  
Application of the Special Prosecutor for Orders Conferring  
Immunity.

Respectfully submitted,

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June 7, 1973

\* Member of the Bar of the State of New York

*Leave to file granted  
John F. Sirica  
6/8/73*

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

FILED  
JUN 8 1973  
JAMES F. DAVEY, Clerk

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In the Matter of the Application of :

UNITED STATES SENATE SELECT  
COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES :

---

Misc. No. 70-73

STATEMENT

American Broadcasting Companies, Inc. (ABC),  
Columbia Broadcasting System, Inc. (CBS), National Broadcasting  
Company, Inc. (NBC) and Public Broadcasting Service (PBS)  
join in this amicus statement. If the Senate Watergate  
Committee proceeds in open session, the broadcast press  
should not be prevented from exercising its responsibilities  
to the public.

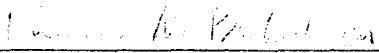
We do not address ourselves to the merits of the  
arguments of the Senate Committee and Special Prosecutor,  
except in this respect. We urge this Court to take cognizance  
of the fact that the Senate Committee investigation and  
its hearings are important news events of which the public  
has an undeniable right to know.

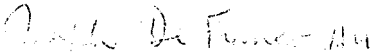
Public Senate hearings have historically been open to  
live television coverage. If the Senate Watergate Committee  
hearings are open to press coverage -- as they should be if

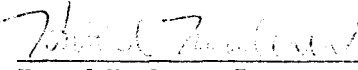
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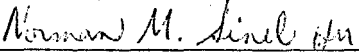
the hearings are public -- there should be no court prohibition against live radio and television coverage.

Respectfully submitted,

  
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June 7, 1973

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CERTIFICATE OF SERVICEIone M. Feldmann

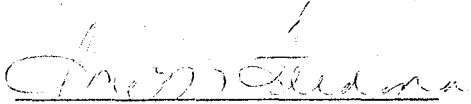
hereby

certifies that on this 7th day of June, 1973, she served  
the foregoing MOTION FOR LEAVE TO FILE AMICUS STATEMENT and  
STATEMENT by hand on the following:

The Honorable  
Archibald Cox  
Special Prosecutor  
Watergate Special Prosecution Force  
U. S. Department of Justice  
Suite 928  
1425 K Street, N. W.  
Washington, D. C.

Samuel Dash, Esq.  
Chief Counsel & Staff Director  
Senate Select Committee on  
Presidential Campaign Activities  
1418 NSOB  
Washington, D. C. 20510

The Honorable  
John J. Sirica  
Chief Judge  
U. S. District Court for the District of Columbia  
3rd and Constitution Avenue - 2nd Floor  
Washington, D. C.

  
Ione M. Feldmann

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

APPLICATIONS OF UNITED STATES SENATE )  
SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ) MISC. NO. 70-73  
ACTIVITIES )

Friday, June 8, 1973

The above-entitled cause came on for hearing at  
10:00 a.m., before THE HONORABLE CHIEF JUDGE JOHN J. SIRICA.

APPEARANCES:

FOR THE COMMITTEE:

SAMUEL DASH, Chief Counsel  
JAMES HAMILTON, Assist. Chief Counsel  
RONALD D. ROTUNDA, Assist. Counsel

FOR THE WATERGATE SPECIAL PROSECUTION:

PHILIP HEYMANN, Assistant to Mr. Cox  
EARL SILBERT, Asst. U.S. Attorney  
SEYMOUR GLANZER, Asst. U.S. Attorney  
DONALD CAMPBELL, Asst. U.S. Attorney

CHARLES SHAFFER  
ROBERT C. MC CANDLES, Counsel for John W. Dean, III

JAMES BIERBOWER, Counsel for Jeb Stuart Magruder

HOWARD MONDERER (NBC)  
JOSEPH DE FRANCO (CBS)  
THOMAS FROHOCK (ABC)

NOTE: Said proceedings in two parts. The following is Part I.  
Part II filed under separate cover at earlier date.

**NICHOLAS SOKAL**  
**OFFICIAL COURT REPORTER**  
**4800 - F UNITED STATES COURT HOUSE**  
**WASHINGTON, D. C. 20001**  
426 - 7454

P R O C E E D I N G S

THE COURT: All right.

MR. DASH: May we approach the bench, Your Honor?

( AT THE BENCH )

MR. DASH: Your Honor, I am approaching the Bench to advise I am a member of the Supreme Court of Pennsylvania and the Supreme Court of Illinois but not yet admitted to this court and would like to be admitted for this case.

THE COURT: Glad to have you participate. Will you make a motion?

MR. HAMILTON: Yes, sir. I am James Hamilton. I would so move, Your Honor.

THE COURT: All right.

MR. HEYMANN: I am a member of this Bar, Your Honor.

THE COURT: You may be admitted.

MR. SHAFFER: I second Mr. Dash's motion.

THE COURT: All right. I received a motion to intervene this morning by the three networks and I granted leave to file. I can't see there is any objection to the attorneys participating in this argument. It is only a two or three page memorandum attached. Did everybody get a copy?

MR. HEYMANN: We did not, Your Honor.

THE COURT: We will permit you to argue your matter today. All right.

( END OF BENCH. OPEN COURT )

THE COURT: Mr. Dash, are you ready to proceed?

MR. DASH: Yes, Your Honor.

Your Honor, I am Samuel Dash, Chief Counsel for the Senate Select Committee on Presidential Campaign Activities and I am arguing in case No. Misc. No. 70-73 before this Court.

This case comes before the Court on the application by the Senate Select Committee for Presidential Campaign Activities for immunity orders for Mr. Jeb Magruder and Mr. John Dean under 18 U.S.C. Sections 6002 and 6005 which in 1970 gave Congress for the first time powers of granting immunity, use immunity, to witnesses who would not testify before an investigating committee on constitutional grounds.

The issue that the Court asks counsel to argue is the interpretation of the statute where a congressional committee has submitted application to the Court, where if the requirements of the statute are met --and the requirements of this statute are that two-thirds of the members of the committee have voted to apply for such an order and that there be notice, ten days initial notice given to the attorney general that an application will be filed and that after such notice is given that application is filed the attorney general may request twenty additional days and be granted.

If those procedural requirements are met does the Court have the mandatory duty to sign the order, or does the Court have discretion to sign it or not sign it?

Although the Special Prosecutor, Mr. Cox, concedes in his memorandum to this Court that 18 U.S.C. Section 6005 makes it mandatory that the Court issue the immunity order as to Mr. Magruder and Mr. Dean which has been applied for by the Senate Select Committee, he seeks to dilute this clear mandatory provision by advocating that the Court attach conditions to the immunity order and the conditions generally without specifying them would limit up to the publicity of the hearings, to one extreme that the hearings be held in executive session and if not that, that there be restrictions on television and radio broadcasting and commenting until the final report or after trials by members of the staff or members of the committee.

It is submitted that the Special Prosecutor request flies in the face of the express language of the statute and its legislative history and it invites this Court to engage in a severe invasion of the constitutional doctrine of separation of powers.

First, on behalf of the Committee, I would like to address myself to Mr. Cox's reasons for seeking to have these conditions imposed. And basically his reason is that ongoing public televised hearings involving the testimony of witnesses like Mr. Magruder and Mr. Dean testifying under a use immunity order will prevent the criminal prosecutions of major principals involved in the Watergate case.

Your Honor, the Committee rejects this claim made by the Special Prosecutor. First, it must be emphasized that the Select Committee is not a regular committee of Congress which is seeking to butt in in an existing criminal prosecution. It was created by a unanimous vote of the Senate at a time of crisis and of course I think I need not press this kind of argument before Your Honor who presided at the first Watergate trial and knew of the extreme interest of the public and your own expressed positions as to the need to know who else besides those who were indicted were involved and what the real facts were. I think this was an area and a period, and still is, in which the atmosphere in the country presented an overwhelming impact or evidence of loss of public confidence in government, and when there was obvious suspicions of cover-up due to what was apparent to a number of people of incomplete prosecution of the first Watergate trial in January. And I make that statement without any reference or any implication to the diligence or efforts of the present prosecutor, but I think that the present evidence that is accumulating now indicates that that trial was in fact an incomplete trial in terms of who was involved.

The Committee's broad resolution, and a copy of that, Your Honor, is attached to our memorandum, shows that the Committee is mandated to conduct an immediate public investigation of the facts of the Watergate case and any other illegal or improper

activities connected with the presidential campaign of 1972. That such a function is a proper function of the Congress is made very clear in the Supreme Court decision of *Watkins vs United States*, cited on page 2 of our memorandum, and I would like to quote what I think is a pertinent quotation. The Court said at page 200:

"There is a power of the Congress to inquire into and publicize corruption, maladministration or inefficiency in agencies of the government."

That was the only kind of activity described by President Woodrow Wilson in *Congressional Government*, a book he wrote, when he wrote in that book:

"The informing function of Congress should be preferred even to its legislative function. From the earliest times in its history the Congress has assiduously performed an informing function of this nature."

I state to the Court the informing function of Congress is not to be just a convening investigating committee to inform the public. The Congress cannot do its business. No legislation of importance can really be enacted unless it has public support and if enacted without public support it cannot long survive. Therefore, the public informing function is an integrated role of the legislative function as well in order to receive public support for what Congress wishes to do.

At the time the Committee began its public hearings on May 17th there were no new indictments returned by the grand jury and still at this time there are no new indictments. Indeed, the U.S. Attorney's Office has indicated that indictments may not be forthcoming for about 60 to 90 days. By that time the Watergate phase of the Committee's hearings will have been completed. No witness testifying under use immunity before the Committee is shielded from prosecution. If the Prosecutor has independent evidence such a witness can be indicted, tried and convicted. Indeed, this was the very purpose of the new legislation in 1970, to limit the immunity to use immunity rather than transactional immunity, so if a Congressional committee needs the testimony of a witness and has to grant immunity it does not impede the prosecutor from prosecuting that person if the prosecutor has independent evidence. And the only immunity which we are requesting before this Court under the statute is use immunity alone. And we submit that Mr. Cox's fears that our receiving such testimony under such use immunity would impede or prevent prosecution is totally unfounded, and in fact was contemplated by the Congressional act and was taken care of by the use immunity provision.

Further, despite the attendant publicity of the public hearings this alone, Your Honor, has never been held by



any court to prevent a prosecution.

The Delaney case has frequently been cited and we refer to that case in our brief and I will go into it more in depth later, but in the Delaney case which is probably the leading case on the issue of the impact of a prosecution and a Congressional committee hearing, the remedy was not conditioning or restricting the Congressional committee but was continuing the criminal case. In Delaney a request for continuance by the defendant was denied and the Court reversed on that basis. But Delaney clearly, as I will indicate, states that the Congressional committee's hearing has a right to go on and makes this a very special distinction in a situation where the Congressional committee hearing is begun prior to indictment.

Now, first I would like to address myself to the specific language of the statute.

Section 6005 and Section 6002 in no way by the clear language of the statute support the position of Mr. Cox that this Court can impose conditions on the order of immunity. Indeed, the statute says that when the application is made and alleges and sets forth that the statutory requirements are met the Court shall issue the order. And the word "shall" was not put there without particular purpose because the legislative history makes it clear that "shall" was meant, and I will briefly get into that legislative history.

Prior to that, I think if one wanted to read into the statute the kind of condition that Mr. Cox would suggest to this Court one would have to do major surgery on this statute. One has to recognize that the statute is only three years old. It was passed by Congress at the height of television communications. Clearly, Congress contemplated highly publicly charged hearings in the Congress that would be on television, on radio, and covered by the press, and if Congress was concerned and wanted to give the Court the power to condition an order by restricting television or radio communication, Congress clearly has the means to do so. It could put such words in the statute or legislative history but the legislative history makes it clear that Congress was so concerned about the important constitutional doctrine of separation of powers that it didn't even contemplate adding any condition to the Court's power to grant the order, and rather it emphasized in its legislative history that the Court's duty was ministerial and mandatory and not discretionary.

Let me just briefly get to that legislative history. It is very clear in the legislative history from the House Report and the Senate Report, that the Congress in contemplating this statute made it clear that there would be no discretion in the court and that the court's responsibility was to sign the order and that the attorney general himself had no discretion to veto the application of the Committee.

Perhaps one of the most important parts of the legislative history are the working papers of the National Commission on the Reform of Federal Criminal Laws. This is the so-called Brown Commission which for a period of years drafted recommendations for the revision of Title 18 of the penal code. And the Brown Commission, actually the draft on immunity, was the very model, was actually the initial draft of the statute that found its way into the Organized Crime Control Act of 1970, which is 18 U.S.C. 6005 and 6002. And much of the legislative history is to be found t here. On page 1440 the working papers in constructing what the statute was to mean said that the Congressional statute was drafted to avert problems both of constitutionality and of insufficiency of information from meaningful judicial scrutiny. By making t he court's function a weak and paltry thing, ministerial and not discretionary in nature:

And m ore illuminating, the working papers at page 1417 which was I think quite pathetic of what is occurring this morning before the Court, the draftsmen of the working papers said the following concerning this provision:

"An immunity grant is not a matter of right or wrong but a discretionary government act. The federal district court may of course scrutinize the record to make certain the Congressional request for immunity order is jurisdictionally and procedurally well founded, and

that the attorney general has been notified, but if the attorney general should oppose the Congressional request for immunity order solely because he feels it is unwise, the Court would have no constitutional or other legal basis for siding with the Congress, siding with the attorney general, or making its own calculation of the degree of public need for the information balanced against the loss of a possible opportunity to prosecute a possible criminal."

Later on it goes on to say that it was never contemplated with the three separate branches of government under separation of powers that a confrontation between the Executive Branch and Congressional Branch and put the Court in the middle, and in order to preserve that the Court was given a mandatory ministerial or really record keeping function to see the statutory provisions are met.

Now under the case law I would submit, Your Honor, that actually there is really no support for Mr. Cox's position. Rather, the major cases both in the Supreme Court of the United States and lower courts clearly support the position of the Select Committee before this court.

There is a reference in Mr. Cox's brief to the leading of case/ Ullman vs United States, 350 U.S. 422, 1956. This case, Your Honor, dealt with the statute that preceded the Organized Crime Control Act of 1970 and dealt with the immunity powers

of the attorney general at that time. In that statute, Your Honor, the attorney general in his application had to allege that it was in the public interest and the question presented by a person who was to be granted immunity as to the constitutionality of that statute was that the Court had to resolve that decision as to whether or not it was in the public interest, and since the Court had to do so the statute required the Court to impose discretion on the prosecutor's discretion and this involved a violation of the doctrine of separation of powers.

Mr. Justice Frankfurter indicated that really is not so, that despite the language there had to be an allegation of public interest, that was a requirement of the statute but that determination of the public interest was solely the attorney general's and the Court could not go behind it if it were to preserve its judicial power and not go into executive power. And therefore, in order to read the statute and make it constitutional, Justice Frankfurter said that the statute meant so long as the attorney general said it was in the public interest and put forth all the other requirements of the statute, then the duty of the court was ministerial and had to issue the order.

That was the only way the Supreme Court said the statute would be constitutional under the doctrine of separation of powers.

THE COURT: May I interrupt you a minute on that point. I have some questions here I want to ask you but I think this is an appropriate point to discuss this.

First of all, is it your contention that 6005 gives the attorney general time to isolate his evidence against a potential defendant and to urge the committee to reconsider its immunity request, but that it does not give the attorney general the right to object in court to the grant of immunity? Is that your position?

MR. DASH: Yes, Your Honor. In fact that is the clear statement, what you just read is in the legislative history.

THE COURT: Now, second: if the Court should --and I am not saying that I will or I can-- if the Court for some reason believes that an application for immunity pursuant to Section 6005 in some way constitutes an abuse of the Court's process, is the Court powerless to deny the application for immunity?

MR. DASH: I would say, Your Honor, under Ullman the application for an immunity order by the attorney general or by Congress, was held not to be an abuse of the Court's process but actually a proper use of the Court's process. In fact, in further response to Your Honor's question, the legislative history for Section 6005 actually went into the question whether when Congress now in light of Ullman was enacting a new immunity provision, should they leave any role for the Court

at all? Why not have a provision which if Congress wants to grant immunity to have a two-thirds vote, notify the attorney general and after the notification is over the immunity attaches, or if the attorney general wants it he makes the decision and that is the ultimate decision. And there was some feeling that perhaps was an appropriate thing to do, but in reviewing the role of the court in the past, the traditional role, to serve as a recording function to see to it the statutory requirements are met; and also I think another important role and I think Your Honor yourself has seen this role when you notified the counsel for the parties referred to in these immunity applications to be present although the statute doesn't require it, I think Your Honor has notified them and I think it is quite appropriate because in the legislative history it states there may be situations where a congressional committee is before a court asking for an order of immunity when the scope of its authority in its resolution would not allow it to have that witness come before it because no question put to that witness would fit within the scope of authority. I think if the witness so felt he could make that argument to the Court that is a matter the court could determine because the scope of the resolution is clearly within Your Honor's jurisdiction.

So the legislative history makes it clear there is a very proper formal function of the court, it is a mandatory function in the sense of issuing an order the statutory requirements

are met, but that determination is an important function and not abuse of process of this court.

It is true that in coming to court we do invoke the process of the court and I think this is sort of the weak straw that Mr. Cox relies on in asking Your Honor to impose conditions because his position is since we come to court to ask for an order then we subject ourselves to whatever conditions the court seeks to impose or feels is appropriate to impose. But Ullman was a similar case. The attorney general also had to invoke the process of the court and Justice Frankfurter made it very clear that if the court went beyond ministerial function of determining the statutory requirements were met it would step on the doctrine of separation of powers and/would be unconstitutional and therefore I suggested what Mr. Cox is asking this court to do is to take that step which would violate the separation of powers.

Now the case which is also referred to but not really at length by the Special Prosecutor is Delaney vs United States, which I referred to earlier. And here the subcommittee on the administration of internal revenue laws which was called the King Committee, held hearings. In Delaney, and I think it is very important, the witness had already been indicted and then he was called before the committee. Then when he went to trial he asked for a continuance and the continuance was denied. Delaney holds that where there is highly publicized



committee congressional/hearings and a trial follows, that the defendant has a right to a continuance to a time when the prejudicial effect of those hearings has been dissipated. But it is clear in the Delaney case what the court said was that is the remedy because the court in the Delaney case itself said ---and I am quoting from page 8 of our memo: "We mean to imply no criticism of the King Committee. We have no doubt the committee acted lawfully within the constitutional powers of Congress duly delegated to it. It was for the committee to decide whether considerations of public interest demanded at that time a full dress public investigation."

And I think much more important, Your Honor, is what the court had to say about our situation because Delaney was the case where indictments had come down and then the committee went ahead with its hearings. Delaney said we do not decide that case but suggested this in the dictum of the opinion, and I think this is very pathetic and important at this time.

The court said: "We limit our discussion to the case before us and do not stop to consider what would be the effect of a public legislative hearing causing damaging publicity relating to a public official not then under indictment. Such a situation may present important differences from the instant case. In such a situation the investigative function of Congress has its greatest utility, Congress is informing itself so that

it may make appropriate legislative action, it is informing the Executive so existing laws may be enforced, and is informing the public so the democratic processes may be brought to bear to correct and disclose executive actions. Also, if as a result of such legislative hearings an indictment is eventually procured against a public official then in a normal case there would be much greater lapse of time between the publicity accompanied by the public hearing and trial of a subsequently indicted official than would be the case if legislative hearings were held while the accused is awaiting trial pending indictment."

Your Honor, I think that language fits like a glove the case before you.

Now, one of the leading cases is the Hutcheson case. And we cite the Hutcheson case on page 10 of our memorandum. I think it is a very relevant case because it is a very recent case. Hutcheson dealt with the McClellan Committee hearings and I would suppose if any hearings were more publicly charged and received more publicity on television and the news media it was the McClellan hearings looking into improper labor activities, sometimes called the Hoffa hearings, or Teamster hearings.

THE COURT: This was back in about 1960?

MR. DASH: In the '60s, yes. There, Your Honor, you had even, I think, a tougher situation for the particular

individual involved. Hutcheson had been indicted. And he was called before the McClellan Committee and was asked questions. Now, the McClellan Committee astutely kept away from asking any questions which would relate to the pending indictment; but nevertheless, it asked many questions involving criminal activity and improper activity. The defendant, or the witness, appearing before the committee refused to answer questions on the ground he was indicted pending trial and that this would seriously jeopardize his chances for a fair trial. The Committee ordered him to answer, he didn't, and he was cited for contempt. I think it may be significant that the lawyer who successfully argued that case before the Supreme Court taking the position that we take before you this morning was Solicitor General Cox who argued that the congressional committee had a right to continue its hearing and had a right to issue that citation for contempt, and this was upheld by the Supreme Court.

I think that is a case, Your Honor, which probably is even a stronger situation than this one because there indictments were down and it really affected a witness before a committee held in contempt while he was under indictment.

Now, Your Honor, very briefly I would just like to distinguish a number of cases which Mr. Cox has raised in his memorandum. I think overall, and I respectfully submit to the Court that none of these cases are either relevant or support his position.

THE COURT: In their legal memorandum, the government's, they rely upon cases in which the indictments were returned. In this case we have no indictments, no defendants in this second phase.

MR. DASH: That is true, Your Honor.

THE COURT: This does make, I think, a considerable difference.

MR. DASH: But even in those cases, Your Honor, the cases where indictments, like Hutcheson the Court still said that the Legislative Committee had a right to continue. In Delaney the Court did make the distinction that you make, and I think the distinction is this: that if indictments come down the courts have held that the congressional committee ought to be very careful in considering whether it should proceed in public hearings. But if there are no indictments Delaney says there is practically a duty on the congressional committee to proceed because its public function is to go forward so the Executive of the government will do its job.

THE COURT: As a practical matter doesn't it frequently happen in connection with congressional investigations, assuming that no indictments have been returned, that the government is at somewhat of an advantage in this respect, that it gets certain leads and information from the congressional investigation that might be helpful in connection with the grand jury proceedings? I don't know whether they have gotten any information helpful

to the grand jury investigation or not, but I recall many years ago, I think it was 1957 or '58, when I became a member of the Court, I think I tried the first case growing out of the labor racketeering investigation on the Hill. I think President Kennedy was then chairman of that committee and there was a man by the name of Frank Brewster in charge of the Western Division of the Teamsters, he was convicted in my court for contempt of congress for failure to answer certain questions. It seemed to me the investigation had gone on for sometime and indictments were returned after the investigation and there was quite a bit of publicity around the country, front page news, etc. So it is not without precedent that an investigation precedes indictments.

MR. DASH: I think that is true, Your Honor. I think a congressional investigation actually could first-cause a prosecutor to contemplate.

THE COURT: I think that happened in the Teapot Dome scandal. I think there was an investigation first on the Hill and subsequent to that there were indictments returned.

MR. DASH: Yes. And that is why I think although that may not be the case here because there is an on-going grand jury investigation of the U.S. Attorney's Office and it was not our position that it was instigated because of our committee hearings but as a matter of precedent in the future in order to maintain public confidence in government and permit

Congress to initiate these things it is important to preserve the right of Congress to conduct these investigations.

I think in the Hutcheson case the important language should be quoted. It says on page 10 of our brief:

"Surely a congressional committee which is engaged in legitimate legislative investigation need not grind to a halt whenever responses to its inquiries might potentially be harmful to a witness in some distinct proceeding or when crime or wrong-doing is disclosed."

And as indicated in that case there was in fact an indictment and we don't have it here.

Just briefly, Your Honor, I would like to touch upon a number of cases which are presented by Mr. Cox. As I suggested most of these cases, what he attempts to do with these cases is provide a basis or platform for the court drawing some power to impose these conditions. And what I suggest to Your Honor none of these cases even suggested, he doesn't find help in the statute, he doesn't find any help in the legislative history, rather far from being silent as he suggests, it is quite compelling there is no power to impose conditions. He then looks for a number of cases which are fragmentary in their references to the issue and helps to build up a platform.

I think one of the cases he relies on heavily is a recent Supreme Court case --Doe vs Mellon, and emphasizes this is a case in which the court did interfere with the publication

of a committee's hearing, but that case, Your Honor, was House District of Columbia Committee which looked into the public school system and after the hearings was going to issue a report and in that report was going to public the records of little children test-takers, their absenteeism, their delinquency, and what the court said there didn't seem to be sufficient legislative purpose to expose the little children's absenteeism and failing test records to the public.

By the way, the interesting thing is the court said there could have been no interference with the congressional committee itself if during the hearing it wanted to have the evidence submitted there would be no effort to enjoin or prevent it, but felt there was no legislative purpose to bring it out. The suit was brought by the families of these kids.

compare that, to  
To/protect the privacy of children in school with an investigation mandated by the Senate where there is evidence of major official corruption, and I read the Watkins quote, clearly there is quite a distinction between whether or not the informing function of Congress to inform the public about official corruption and a case that deals with the privacy of little children in school I think there is no basis to compare that case to the instant case.

The Dombrowski vs Eastland case that Mr. Cox cites on page 12 of his memo merely states where the act of the

congressional committees, mainly its staff, is not any way related to its authority or resolution the Court can permit a cause of action to proceed.

Sheppard is cited by Mr. Cox, and it is a very famous case involving fair trial, free press and the extreme publicity of a famous murder case. That had to do with court room decorum and what was going on at the time of trial.

THE COURT: They didn't have a sequestered jury in the case, they had 20 newspapermen stretched across inside the rail and one was a few feet from the jurors, I think. The judge was running for reelection, and the prosecutor. Everything happened.

MR. DASH: And, Your Honor, despite all that the decision of the court isn't that the case be dismissed but that it could be retried at a proper time.

By the way, I am really mystified. My famous case --I consider famous --

THE COURT: --you notice I have the reporters, if I have room, sit behind the rail when I have a jury in the box.

MR. DASH: As I say, the case which mystifies me is the Miranda case, but Miranda deals with custodial confessions. We are dealing with use immunity which can never be used against that witness. What Miranda has to do with this situation I don't know. Bruton is a case where a confession of the co-defendant



was used in trial, and it deals with the fact realistically a judge's instruction may not be able to wipe out that prejudice of a jury but here we are dealing with pretrial publicity where the remedies are continuance, voir dire, and other matters and the Bruton case I submit is completely irrelevant.

Kilbourn, also cited by Mr. Cox, on page 3 deals again with a congressional committee trying to stick its nose in a bankruptcy suit where it didn't have a resolution and I think our resolution is quite different.

So I say this respectfully, Your Honor, to the Court and to Mr. Cox, that his line of authorities cited support his position probably as strongly as would a thread of gossamer.

Now in conclusion, we are before this Court at a time of great emergency concerning public confidence in its government. The Select Committee fully respects the role of the Special Prosecutor and urges him to push ahead to secure indictments and prosecute at trial those indicted in appropriate time. If he has the evidence we have, and if he has the evidence that we no doubt know he had, he can obtain conviction. However, the Select Committee is doing the urgent public business in public under a unanimous mandate of the Senate with the need to report the facts now. The statute makes it mandatory that the order issue without conditions and that the manifest public interest is against the Special Prosecutor's proposal to conceal the fact

of what happened in the Watergate case from the public at this time when this is the greatest time for the public to know.

THE COURT: Mr. Dash, one or two questions just so I can get your position clear in my mind.

Now, is it your understanding that if the immunity orders are signed the witness must invoke his Fifth Amendment privilege in response to a question?

MR. DASH: Yes, Your Honor.

THE COURT: From the committee before the immunity actually takes effect?

MR. DASH: Yes, Your Honor.

THE COURT: I am referring to the following language and I say this for the benefit of counsel for the government, referring to the following language found in the working papers of the National Commission on the Reform of Criminal Laws which are cited in your memorandum on page numbered 1442 which state:

"In subsection (b) of Section 1 the proposed draft authorizes the issuance by the appropriate authority of the direction to the witness to testify or produce other information in advance of the time when the witness actually asserts his privilege against self incrimination. It is made clear, however, that the direction does not become effective, that is, immunity is not conferred until the witness does assert his privilege on the direction to

testify is communicated to him by the presiding official at the inquiry."

That is the way I understand it.

MR. DASH: Yes, Your Honor, very much so. Any order you may sign based on our application does not become effective until the witness who is sworn appears before the committee and in fact refuses to answer the question on the grounds of the Fifth Amendment or any other constitutional grounds that protect him. If he answers without it he does not have immunity.

THE COURT: We have in some cases followed a different procedure. I think Mr. McCord appeared before the grand jury first, asserted his Fifth Amendment privilege and was brought into court and the reporter took the stand and read a series of questions propounded to him, I heard the questions, I think everybody in the courtroom heard it, but apparently you do it a little differently.

MR. DASH: I think similarly -- it is our position that if the witness is asked the first question and refuses, as Senator Ervin who sits in executive session will generally propound a couple other questions and will then ask the witness if questions of the same sort were put to him within the resolution of the committee, would he persist in refusing to answer, and I think if you have that statement that meets the requirement.

THE COURT: Now, in what way is televising of the testimony of Mr. Magruder and Mr. Dean necessary to fulfill the

legislative functions of the committee?

I think you touched upon that briefly.

MR. DASH: Yes, Your Honor. Just briefly it is not our purpose, and I would like to make it very clear, it is not the purpose of the committee to put a show-hearing on in this country. It never was our purpose and I hope the hearings as they are being presented are being presented with dignity and professionally.

Now, as to the televised portions and why it is our position that the hearings should be not only public but reach every home in the country if possible is because we are in this time of crisis and loss of confidence by the public and this needs remedial legislation. Our committee is not a prosecuting committee. It is an investigating committee for legislation and we hope when we are through we will have documented the need for remedial legislation, but we are in an area where the kind of remedial legislation will have tremendous impact in the political sector and the only way I think Congress will enact such remedial legislation it have very strong support from the public, and that support from the public will not come forward unless the public is convinced if certain things that occurred, if they occur again can destroy democracy.

THE COURT: One further question. You may not be able to answer this question, maybe Mr. Silbert can.

Has Mr. Magruder testified before the grand jury?

MR. DASH: I don't know the answer to that, Your Honor.

THE COURT: I will ask Mr. Silbert.

If he has testified has he been granted immunity?

I don't recall signing an order granting him immunity. Maybe Mr. Silbert can answer that.

If he has testified before the grand jury and waived any Fifth Amendment privilege he might have, does that affect your request?

MR. DASH: I submit it doesn't based on counsel's position to us. I presented, by the way, Mr. Bierbower who is in court, who sent a letter to me prior to our wishing to interview Mr. Magruder, that if he were called he would reserve the right to assert constitutional privileges. I did raise the question with him if he is appearing before the grand jury and testifying without immunity in what way should he be asking immunity from our committee and his answer was that our resolution is much broader than the focus of the grand jury and that question that we will and may put to Mr. Magruder will go beyond the focus of the present grand jury and therefore he may want to --and I use this term advisedly-- purchase a certain amount of criminality but not much more, and I think in this particular case before our committee he feels he is not waived, and anything he testifies before the grand jury I don't believe serves as a

waiver of the defendant's rights when he comes before a legislative committee and is being asked broader questions in terms of other criminal acts.

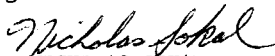
THE COURT: All right, thank you.

MR. HEYMANN: ...

( NOTE: The remainder of these proceedings have been previously transcribed and are filed under separate cover.

CERTIFICATE

It is certified the foregoing is the official transcript of proceedings indicated.

  
NICHOLAS SOKAL  
Official Reporter

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

[ USA vs JOHN DOE, ET AL.

MISC. NO. 77-73

IN THE MATTER OF THE UNITED STATES  
SENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES.

MISC. NO. 70-73

IN THE MATTER OF THE UNITED STATES  
SENATE PERMANENT SUBCOMMITTEE ON  
INVESTIGATIONS.

MISC. NO. 83-73

]

Tuesday, June 12, 1973.

BEFORE THE HONORABLE CHIEF JUDGE JOHN J. SIRICA.

COUNSEL PRESENT

EARL J. SILBERT, ESQ.  
SEYMOUR GLANZER, ESQ.  
DONALD CAMPBELL, ESQ.  
TOM NEAL, ESQ.

✓ RONALD D. ROTUNDA, ESQ.  
PHILLIP HAYMAN, ESQ.  
ALLAN H. FRIEDMAN, ESQ.  
THOMAS J. McTIERNAN, ESQ.

CHARLES NORMAN SHAFFER, ESQ.  
ROBERT C. McCANDLES, ESQ.  
JAMES BIERBOWER, ESQ.

Jack Maher  
Court Reporter

## [ P R O C E E D I N G S ]

9:30 a. m.

THE COURT (Sirica, C. J.): This morning I have filed an opinion outlining the reasons for my decision concerning the immunity request from the Senate Select Committee.

After careful study, it is the Court's opinion that its duties in this matter are purely ministerial and that any attempted exercise of discretion on its part either to deny the request or to grant immunity with conditions would be an assumption of power not possessed by the Court.

I will, therefore, sign the order granting immunity and compelling testimony as proposed by the Select Committee. Inasmuch as the Court is without discretion in this matter, it has not invited comment and will not comment on the wisdom or unwisdom of granting immunity in this case or on the desirability or undesirability of implementing the Special Prosecutor's proposal. My decision and action, therefore, cannot be interpreted as anything more than the Court acting as is required by the law to act.

Copies of the Court's Opinion will be made available to those who desire them in my Chambers following the proceedings this morning. Please see my secretary or lawclerk.

The Court also has before it a motion to quash a Grand Jury Subpoena filed on behalf of Mr. Johan Dean. After



careful consideration of the papers and oral argument, the Court has decided to deny the motion to quash. Mr. Dean will, therefore, be required to appear before the Grand Jury immediately following the proceedings this morning.

[Recess at 9:35 a. m.]

[CERTIFIED The Official Transcript.]

  
Jack Maher  
Court Reporter ]

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF C OMBIA

In the Matter of the Application of:

UNITED STATES SENATE SELECT  
COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES.

Misc. No. 70-73

ORDER CONFERRING IMMUNITY UPON AND COMPELLING  
TESTIMONY AND PRODUCTION OF INFORMATION FROM  
JEB STUART MAGRUDER

The United States Senate Select Committee on Presidential Campaign Activities, having made written application for an order conferring immunity upon Jeb Stuart Magruder and compelling him to testify and provide other information before it, pursuant to Title 18, United States Code, Sections 6002 and 6005, and on Court finding that all procedures specified by s 6005 have been duly followed, it is hereby this 12<sup>th</sup> day of May, 1973

ORDERED that the said Witness in accordance with the provisions of Title 18, United States Code, section 6002 and 6005, shall not be excused from testifying or providing other information before the Select Committee on Presidential Campaign Activities on the ground that the testimony or other information sought may tend to incriminate him.

AND IT IS FURTHER ORDERED that the said Witness appear when subpoenaed by said Committee and testify and provide such other information that is sought with respect to the matters under inquiry by said Committee.

AND IT IS FURTHER ORDERED that no testimony or other information compelled under this ORDER (or for any other information directly or indirectly derived from such testimony or other information) may be used against the Witness in any criminal case, except for perjury, giving a false statement, or otherwise failing to comply with this ORDER.

*John F. Sirica*  
United States District Judge

A TRUE COPY

JAMES F. DAVEY, Clerk

By *James F. Davey*  
Deputy Clerk

*Ben Rotundo*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

IN RE: APPLICATION OF ]

UNITED STATES SENATE SELECT ]  
COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES ]

Misc. No. 70-73

**FILED**

JUN 12 1973

OPINION

JAMES F. DAVEY, Clerk

The Court has today entered orders which will confer what is commonly termed "use immunity" on two witnesses who are scheduled to appear before the Senate Select Committee on Presidential Campaign Activities (Select Committee). The orders provide that should the witness refuse on Fifth Amendment grounds to give testimony as requested by the Select Committee, "use immunity" may be conferred by the Committee chairman. Thereafter, on pain of contempt, the witness will be required to fully answer the questions put to him and provide the information sought unless such testimony is otherwise privileged. The prospective witnesses, Jeb Stuart Magruder and John W. Dean, III, have not opposed entry of these orders. The Attorney General, however, as represented by Special Prosecutor Archibald Cox,<sup>1/</sup> has objected to grants of immunity without attendant conditions limiting the publication of testimony. The Court, upon application of the Attorney General's representative, granted a 20-day delay in consideration of the Senate requests, and in the meantime asked the Select Committee and the Special Prosecutor to file written memoranda treating the question of judicial discretion under the applicable statute.<sup>2/</sup> Specifically the Court asked whether

<sup>1/</sup> Throughout these proceedings, the Court has considered the Special Prosecutor to be acting, for the purposes of his assignment, in the capacity of Attorney General.

<sup>2/</sup> A joint statement amicus curiae was also filed on behalf of four networks: American Broadcasting Companies, Inc., Columbia Broadcasting System, Inc., National Broadcasting Company, Inc. and Public Broadcasting Service.

a court might properly exercise any discretion to deny an immunity request of the legislative branch even though procedural prerequisites were met. The Court subsequently heard oral argument in the matter. Pursuant to the reasoning set forth below, the Court has concluded that in this case, its duties are purely ministerial, and that any attempted exercise of discretion on its part, either to deny the requests or to grant immunity with conditions, would be an assumption of power not possessed by the Court.

We are dealing with the series of statutes under Title 18 of the United States Code, beginning with § 6001, which control the granting of immunity to witnesses. The specific section here construed is § 6005, titled "Congressional proceedings" and is set out below:

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before either House of Congress, or any committee, or any subcommittee of either House, or any joint committee of the two Houses, a United States district court shall issue, in accordance with subsection (b) of this section, upon the request of a duly authorized representative of the House of Congress or the committee concerned, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) Before issuing an order under subsection (a) of this section, a United States district court shall find that --

(1) in the case of a proceeding before either House of Congress, the request for such an order has been approved by an affirmative vote of a majority of the Members present of that House;

(2) in the case of a proceeding before a committee or a subcommittee of either House of Congress or a joint committee of both Houses, the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee;

(3) ten days or more prior to the day on which the request for such an order was made, the Attorney General was served with notice of an intention to request the order

(c) Upon application of the Attorney General, the United States district court defer the issuance of any order under subsection (a) of this section for such period, not longer than twenty days from the date of the request for such order, as the Attorney General may specify.

Prior to the effective date of § 6005 and its companion sections (December 15, 1970) the immunity of witnesses was controlled by at least 50 separate statutory provisions.<sup>4/</sup> With the enactment of § 6001, et seq., however, all other such provisions have been repealed thereby bringing under one roof and standardizing for the first time federal immunity measures.<sup>5/</sup>

<sup>3/</sup> § 6002, referred to in subsection (a) of § 6005, defines the practical import of immunity whether in a court, grand jury, legislative or administrative setting. § 6002 reads as follows:

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to --

- (1) a court or grand jury of the United States,
- (2) an agency of the United States, or
- (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order ( or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

<sup>4/</sup> Hearings, Senate Subcommittee on Criminal Laws and Procedures, 91st Cong., 1st Sess. (March 26, 1969) at 281-288. [Hereinafter cited as Senate Hearings].

<sup>5/</sup> Though not relevant to the instant matter, one current exception should be noted. Title 18 U.S.C. § 2514, which allows United States Attorneys to seek immunity from prosecution for a witness for any "transaction, matter or thing" about which the witness may testify, the so-called "transaction immunity," has a repeal date of December 15, 1974, and is therefore still in force at the present time.

§ 6005 deals with "use" as opposed to "transaction" immunity. Transaction immunity may be simply described as that which precludes prosecution for any transaction or affair about which a witness testifies. Use immunity, by contrast, is a grant with limitations. Rather than barring a subsequent related prosecution, it acts only to suppress, in any such prosecution, the witness' testimony and evidence derived directly or indirectly from that testimony. Evidence obtained wholly independently of immunized testimony may serve as a basis for prosecuting the witness for activities and transactions including those covered in his own statements.

The question has naturally arisen as to whether use immunity adequately supplants one's Fifth Amendment right against self-incrimination. Following the Supreme Court's decision in Counselman v. Hitchcock, 142 U.S. 547 (1892), in which a use immunity statute was struck down, it was for some time supposed that only transaction immunity could afford protection co-extensive with the privilege against self-incrimination. A later case, Brown v. Walker, 161 U.S. 591 (1896), upheld the immunity concept (that of exchanging the right to silence for protection from prosecution) but dealt only with a transaction immunity statute. The Murphy v. Waterfront Commission, 378 U.S. 52 (1964) decision, however, implied that the traditional interpretation of Counselman was incorrect and that protection against the direct and derivative use of compelled testimony could adequately replace the Fifth Amendment privilege. Finally, last year, the Supreme Court sustained Title 18 U.S.C. § 6001, et seq. as constitutionally sound on its face. See Kastigar v. United States, 406 U.S. 441 (1972). For the purposes of the matter now under consideration, the Court considers Kastigar as definitively establishing the constitutionality of § 6005.

The model for what is now § 6005 originated with the National Commission on the Reform of Federal Criminal Laws (Commission).<sup>6/</sup> At the time the Commission was pursuing its studies, the Senate Judiciary Committee was engaged in hearings on S. 30 (organized crime control bill) which included at Title II provisions treating the question of immunity in grand jury and court proceedings. The Commission later recommended to the President that a general and comprehensive use immunity statute be adopted which would be applicable in grand jury, court, legislative, and administrative proceedings. In April, 1969, the President conveyed such a recommendation to the Congress, and on May 12, 1969, Senator McClellan for himself and Senators Ervin and Hruska introduced S. 2122 in the Senate and Congressmen Poff, Edwards and Kastenmeier<sup>7/</sup> introduced a companion bill, H. 11157, in the House. These bills implemented the Commission's recommendation with no substantive changes as far as the provisions for congressional proceedings were concerned.<sup>8/</sup> The Senate Judiciary Committee substituted S. 2122

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<sup>6/</sup> The Commission was appointed by the Congress in 1966 "to undertake a study of the Federal criminal laws and recommend improvements." The Commission consisted of twelve members: three appointed by the President, three Federal judges appointed by the Chief Justice, three Senators appointed by the President of the Senate, and three members of the House of Representatives appointed by the Speaker. See Senate Hearings at 280.

<sup>7/</sup> All three House sponsors were members of the Commission. Congressman Poff served as its Vice-Chairman.

<sup>8/</sup> As drafted by the Commission, the proposed statute read:

Section (4). Immunity Before Congress

(a) When the testimony or other information is to be presented to either House or a committee of either House or a joint committee of both Houses of Congress, the direction to the witness to testify or produce other information shall be issued by a United States District Court, upon application therefor by a duly authorized representative of the House or committee concerned, and subject to the requirements of this section.

(b) Before issuing the direction, the court must find that application was authorized, in the case of proceedings before one of the Houses of Congress, by affirmative vote of a majority of the members present of that House, or in the case of proceedings before a committee, by affirmative vote of two-thirds of the members of the full committee.  
(continued to next page)

for the original Title II of S. 30, and the House Judiciary Committee subsequently reported out the new version of S. 30 Title II. The bills were enacted without further amendment on October 15, 1970.<sup>9/</sup>

8/ (continued)

(c) Notice of the application for issuance of the direction shall be served upon the Attorney General at least ten days prior to the date when the application is made. Upon request of the Attorney General, the court shall defer issuance of the direction for not longer than thirty days from the date of such notice to the Attorney General.  
See Senate Hearings at 292.

S. 2122, by comparison, was as follows:

§ 6005. Congressional proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before either House of Congress or any committee, or any subcommittee of either House, or any joint committee of the two Houses, a United States district court shall issue, in accordance with subsection (b) of this section, upon the request of a duly authorized representative of the House of Congress or the committee concerned, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this chapter.

(b) Before issuing an order under subsection (a) of this section, a United States district court shall find that --

(1) in the case of a proceeding before either House of Congress, the request for such an order has been approved by an affirmative vote of a majority of the Members present of that house.

(2) in the case of a proceeding before a committee or a subcommittee of either House of Congress or a joint committee of both Houses, the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee; and

(3) ten days or more prior to the day on which the request for such an order was made, the Attorney General was served with notice of an intention to request the order.

(c) Upon application of the Attorney General, the United States district court shall defer the issuance of any order under subsection (a) of this section for such period, not longer than twenty days from the date of the request for such order, as the Attorney General may specify.

See Senate Report No. 91-617, 91st Cong., 1st Sess., (Dec. 16, 1969) at 7. [Hereinafter cited as Senate Report].

9/ For a complete account of the legislative history see Senate Report at 55, 56.



In its Working Papers, the National Commission thoroughly explored the language and intent of what is now § 6005, and indeed anticipated the type of situation now before the Court. Both the House and Senate Committees relied heavily on the testimony of Commission members and adopted the Commission's recommendations concerning immunity without significant modification. Counsel for the Select Committee and for the Special Prosecutor have both made references to these Papers. For these reasons, the Court believes it appropriate to refer in the following discussion to the clarifying and interpretive language of the Commission's Working Papers.

# I.

On its face, § 6005 casts the role of the Court in terms of ministerial duty. The language is mandatory: ". . . a United States district court shall issue, . . . upon the request of a duly authorized representative of the House of Congress or the committee concerned, an order . . . ." (emphasis added). The statutory language imposes only two prerequisites or conditions,<sup>10/</sup> both procedural, for issuing the requested order: (1) if the proceeding is before a House of Congress, the request for an immunity order must have been approved by a majority of the Members present; if the proceeding is before a committee, subcommittee, or joint committee, the request must have been

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<sup>10/</sup> It is taken as granted by the statute that: (1) the individual from whom the testimony is sought, has been or may be called to testify, (2) the witness refuses or will refuse to give testimony on the basis of his privilege against compulsory self-incrimination, (3) the request from the concerned House of Congress or committee is made through a duly authorized representative, and (4) the proposed order indicates that the witness' privilege against self-incrimination is to be supplanted by the limited immunity conferred under § 6002.

approved by two-thirds of the full committee membership, (2) at least ten days prior to filing the immunity request with the court, the committee or House must have provided the Attorney General with notice of an intention to seek immunity for the named witness or witnesses. In short, judicial discretion cannot be found on the face of the statute.

It is significant also to note that when the immunity relates to congressional proceedings, the Attorney General is deprived of the discretion he enjoys under other sections of the statute. For grand jury and court proceedings (§ 6003) and certain administrative proceedings (§ 6004) the Attorney General may deny permission to seek an immunity order from the Court. Although § 6005 permits the Attorney General to apply to the court for a 20-day extension in which the court "shall defer the issuance of any order," no veto power or other authority is bestowed.

A recourse to the legislative history of § 6005 for aid in defining the Court's role indicates that the drafters specifically intended the court, in normal circumstances, to grant immunity orders without regard to its own judgment or opinion. The Senate and House Reports contain almost identical statements on this point.

A court order must be obtained based on an affirmative vote of a majority of members present in a proceeding before either House or a two-thirds vote of the members of the full committee in a proceeding before a committee. Ten days' notice must be given to the Attorney General prior to seeking the order. The court must defer issuance up to 20 days at the Attorney General's request. As in administrative proceedings, however, the Attorney General is not given veto power. Nor is the court given any power to withhold the order if the factual prerequisites are met. (Emphasis added).

See Senate Report at 146, and House Report No. 91-1549, 91st Cong., 2nd Sess. (Sept. 30, 1970) at 43.

The language of the Working Papers, though somewhat blunt, is clear.

In speaking of what is now § 6005, the Papers state:

. . . [P]roblems both of constitutionality and of insufficiency of information for meaningful judicial scrutiny, have been averted by making the court's function a weak and paltry thing -- ministerial, not discretionary in nature.

The draft statute, accordingly, in continuing the requirement of application to a United States district court, makes more clear than the present statute the intention that the court's function is not discretionary. The court "shall" issue the direction to testify subject to a finding that the procedural requirements concerning specified voting arrangements in Congress, and notice to the Attorney General, have been met.

Working Papers of the National Commission on Reform of Federal Criminal Laws, Vol. II (1970) at 1440. [Hereinafter cited as Working Papers].

Counsel have directed the Court's attention to two cases which discuss judicial discretion in the context of the predecessor statutes to § 6001, et seq. The first of these is Ullman v. United States, 350 U.S. 422 (1956). In Ullman, a potential witness sought to have the Court reject a request for an immunity order put forth by the Attorney General. Although the Ullman statute required the immunity order to be in the "public interest," the Court (per Justice Frankfurter) held that the judicial branch had no discretion to deny the order if the procedural prerequisites were met. Quoting District Judge Weinfeld, the Court stated that an interpretation giving the Court discretion would "raise a serious constitutional question under the doctrine of separation of powers." (350 U.S. at 433).

A nondiscretionary function on the court's part, said Justice Frankfurter, would be within its proper judicial power and would not usurp the constitutional power of a coordinate branch, in this case the Executive. The second case, a decision by the Court of Appeals in this Circuit, construed a statute which again was phrased in terms less restrictive on the court than § 6005. In re McElrath, 101 U.S. App. D.C.

290, 248 F.2d 612 (1957), an en banc decision, involved a request for immunity by the Senate Committee on the Judiciary and its Internal Security Subcommittee to which the prospective witness objected. The statute involved would, on its face, have allowed far more discretion to the District Court than the present one. It provided only that the requested immunity order "may be issued upon application by a duly authorized representative of . . . the committee concerned." Judge Burger, speaking for four concurring judges, stated:

The discretion of the District Court is limited at this stage to a determination of the procedural regularity of an application and does not embrace such issues as the scope of the inquiry of the Committee, the pertinency and relevancy of the questions propounded or the constitutionality of the statute. 101 U.S. App. D.C. at 295.

If then, neither the Attorney General nor the court may deny a congressional application, the question naturally arises, "For what purpose does § 6005 require notice to the Attorney General and approval by the court?" Though the statute itself is silent here, the Working Papers again include a comprehensive discussion. With respect to the Attorney General, the Working Papers state at page 1440:

In the special instance of congressional inquiries, in contrast to administrative proceedings, it would be virtually unthinkable to give the Attorney General the additional power of disapproval of conferment of immunity, because in a Teapot Dome-type congressional investigation the Attorney General himself would be the focus of the inquiry.

Nevertheless, the Commission and the Congress did recognize the seriousness of immunization against punishment for crime and the potential adverse effect the conferring of immunity might have on criminal law enforcement. It was with the intent of minimizing any prejudicial impact on present and future law enforcement plans that the provision requiring notice of intended immunization was adopted. It was expected that timely notice would allow the Attorney General to assess the effect of a grant of immunity on investigations or prosecutions and then, should he feel it

necessary, communicate with the concerned House of Congress or committee to "lobby" for a modification of immunity plans. (Working Papers at 1406). The memorandum filed by the Special Prosecutor indicates that he has made use of this opportunity although to no avail, as yet. It was also anticipated that a period of time up to 30 days would permit the Attorney General to "insulate from the immunity grant any incriminating data already in his files prior to the witness' testimony." (Working Papers at 1406). Presumably, if such incriminating data is available to the Special Prosecutor in this case, he has taken advantage of the opportunity to "insulate" it. Thus, though he is accorded no right to be heard in court in opposition to an immunity request, the Attorney General is given some protection in his role as the administrator of Federal law enforcement by the notice requirement of § 6005.

With regard to court approval, the Commission expressed some strong reservations. It suggested at page 1436 of the Working Papers, that Congress give serious consideration to eliminating the judicial role altogether. The basic objection to court participation concerned the constitutional "separation of powers" doctrine. The problem was highlighted in the Ullman v. United States case cited earlier. To uphold an immunity statute which required use of the judicial process, the Supreme Court felt constrained to read the statute as giving courts no discretion to deny immunity, the reason being that the judicial function is a determination of "right" or "wrong" while a decision to grant immunity is not "right" or "wrong" but purely a matter of discretion. The Working Papers sum up the import of Ullman thusly:

Immunity is the fixed price which the government must pay to obtain certain kinds of information, and only the government can determine how much information it wants to "buy" in the light of the fixed price. Viewed thusly, a court has nothing on which to base a determination whether a given immunity grant is "right" or "wrong," whether it should be made, or whether it should not be made. Indeed, for a court to attempt to make such a decision, or for Congress to attempt to confer such a role upon a constitutional court, would raise serious questions of separation of powers under article III, i.e., conferment on a constitutional court of a function not "judicial" in nature.

Working Papers at 1434-35.

An attempt to force upon the courts the necessity of second-guessing the propriety or wisdom of specific immunity requests would, perhaps unconstitutionally, put the courts "in the middle."

An immunity grant is not a matter of right or wrong, but a discretionary governmental act. The Federal district court may of course scrutinize the record to make certain that the congressional request for an immunity order is jurisdictionally and procedurally well founded, and that the Attorney General has been notified. But if the Attorney General should oppose the congressional request for an immunity order solely because he feels it is "unwise," the court would have no constitutional or other legal basis for siding with the Congress, siding with the Attorney General, or making its own calculation of the degree of public need for the information, balanced against the loss of the possible opportunity to prosecute a possible criminal.

Working Papers at 1417.

All this is not intended to suggest, however, that the court is nothing but a rubber stamp. § 6005 clearly requires that it be a checkpoint for assuring proper compliance with the established procedures. The Commission has suggested additional functions as well which derive largely from the courts' inherent powers.

A further supporting reason for continuance of the requirement of application to a district court is that it could conceivably be converted into a sort of declaratory judgment proceeding not on the wisdom of conferring immunity or no, but on the question of constitutional jurisdiction of Congress over the inquiry area, statutory (or resolution) jurisdiction of the particular agent of Congress over the inquiry, and relevance of the information sought to the authorized inquiry.

. . . .

Under our decided cases concerning congressional investigations there are potentially four kinds of restraints of a jurisdictional nature which the courts may impose, in an appropriate proceeding. First, a court may review to ascertain whether the investigation falls within the total constitutional scope of the congressional investigatory power. Kilbourn v. Thompson, 103 U.S. 168 (1880); McGrain v. Daugherty, 273 U.S. 135 (1927); Sinclair v. United States, 279 U.S. 263 (1929). Second, a court may review to ascertain whether a committee investigation exceeds the scope of the authorizing resolution, or perhaps is wholly unauthorized. United States v. Rumely, 345 U.S. 41 (1953). Third, a court may review to ascertain whether the testimony sought is constitutionally privileged under the fifth amendment's self incrimination clause, which is irrelevant in this immunity statute context, or is privileged

under some other constitutional provision such as the first amendment. Although the Supreme Court has not yet allowed a congressional witness to shelter under the first amendment, it has been willing to take a look and has split five to four on the issue. Barenblatt v. United States, 360 U.S. 109 (1959); cf. Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963). Fourth, a court may review to ascertain whether the testimony sought is relevant to the authorized inquiry. Watkins v. United States, 354 U.S. 178 (1957); Deutch v. United States, 367 U.S. 456 (1961).

Working Papers at 1441-42.

To this list might be added the sort of discretion which a court exercises in denying an immunity request because it believes that the statute compelling testimony may be unconstitutional as applied. (See e.g., In Re Grand Jury Witness Sara Baldinger, Crim. Misc. No. 3016 (WF), U.S. Dist Ct. Cent. Dist. Calif. March 14, 1973.) In the present circumstances, none of the above-noted situations are disclosed.

## II.

While the Special Prosecutor acknowledges that the Court cannot withhold entry of the immunity orders here at issue, he nevertheless asks the Court to make such orders conditional. The specific conditions recommended are listed from the Special Prosecutor's memorandum.

1. Requiring, as in the case of criminal trials, the exclusion of the broadcast media (radio and television), when an immunized witness is required to furnish self-incriminating testimony, at least in the absence of an express waiver by the witness and his counsel of any objection to such potentially prejudicial coverage.
2. Limiting the grant of an order directing the witness to testify before the Committee to testimony given in executive session.
3. Conditioning the grant of the Committee's application on the assurance that it will receive the testimony only in executive session and will not publicly release the transcript of the testimony or any summary of it pending completion of the Committee's investigation.
4. Supplementing one or more of the above by directing the witnesses not to discuss or comment upon their

testimony with members of the press or with any persons other than their counsel, members of the Committee and its staff, and prosecuting officers of the Department of Justice.

5. Supplementing one or more of the above by conditioning the grant of immunity on an understanding that the Committee and its staff will not make public statements about the witnesses' testimony pending completion of the Committee's investigation.

In oral argument, counsel for the Special Prosecutor apparently abandoned most of the above recommendations and urged upon the Court a single restriction; that the immunity orders direct the witnesses to testify only outside the presence of television cameras and radio microphones, thus permitting them to assert a Fifth Amendment privilege based on the type of news coverage given their testimony.

Insofar as the Special Prosecutor's proposals ask the Court to judge the wisdom of granting immunity to these witnesses or the appropriateness of coverage by the broadcast media, the foregoing discussion suffices to show that the Court lacks completely any power of intervention. Insofar as the proposals ask the Court to exercise inherent powers in the interest of preserving the rights of potential defendants, additional considerations forbid judicial interference with the Select Committee's investigation and procedures.

The Special Prosecutor has cited a variety of cases which highlight the sort of judicial protections which he seeks. Prominent among these are: Sheppard v. Maxwell, 284 U.S. 333 (1966), Miranda v. Arizona, 387 U.S. 436 (1966), Estes v. Texas, 381 U.S. 532 (1965), Rideau v. Louisiana, 373 U.S. 723 (1963), and Delany v. United States, 199 F.2d 107 (1st Cir. 1952). As precedents for judicial intervention in legislative matters he cites such cases as: Powell v. McCormack, 395 U.S. 486 (1969), Dombrowski v. Eastland, 387 U.S. 82 (1967), and Kilbourn v. Thompson, 103 U.S. 168 (1881).



These decisions, however, are not precedents for what the Special Prosecutor proposes. The one distinguishing feature found in each of the cases regarding fair trials and defendants' rights is the fact that indictments were extant and defendants identifiable. The Court here cannot confront any such "case or controversy." Counsel for the Special Prosecutor at the hearing represented to the Court that indictments in the matter being investigated by the Select Committee are sure to be forthcoming, although a time cannot be estimated, and that Mr. Magruder and Mr. Dean would very probably be named as defendants in such indictments. To broadcast nationally the possibly self-incriminating testimony of Messrs. Magruder and Dean, compelled pursuant to the orders herein, would, asserts the Special Prosecutor, endanger (1) the ability of any persons named by the witnesses in their testimony to obtain a fair trial, (2) the validity of future indictments, and (3) the ability of the Government subsequently to prosecute the witnesses. The fact remains, however, that there are no indictments, no defendants, and no trials. However much the Court may sympathize with the Special Prosecutor's wish to avoid serious potential dangers to his mission, it cannot act on suppositions, and the Special Prosecutor himself has been unable to show where any court has so acted. The matter is simply not ripe for judicial action.

Where a court has indictments or trial proceedings pending before it, it can draw on a well-stocked arsenal of measures designed to preserve the integrity of proceedings and the rights of individuals. It may act to change venue, grant a continuance as in Delany, supra, restrict extrajudicial statements as in United States v. Tijerina, 412 F.2d 661 (10th Cir. 1969), cert. denied 396 U.S. 990 (1969), control the courtroom as per Sheppard v. Maxwell, supra, etc. But even supposing that a court might be able to act in a premature situation such as the instant one, it is clear that the court could not go beyond administering its own affairs and attempt to regulate proceedings before a coordinate branch of government. The case authorities cited by the Special Prosecutor

cannot sustain intervention in this situation under the immunity statutes. On the contrary, decisional law mandates a "hands-off" policy on the Court's part. A sampling of cases will suffice.

Delaney v. United States, 199 F.2d 107 (1st Cir. 1952), is a leading case involving pretrial publicity provoked by a congressional hearing. After Delaney was indicted on matters relating to the administration of the Internal Revenue laws, he was subjected to adverse publicity by hearings dealing with tax matters conducted by the so-called King subcommittee. The Circuit Court reversed Delaney's conviction because of the District Court's failure to grant a continuance, but noted that this indictment could still stand and that, with an appropriate continuance, Delaney could have received a fair trial. The Court stated further:

We mean to imply no criticism of the King committee. We have no doubt that the Committee acted lawfully, within the constitutional powers of Congress duly delegated to it. It was for the Committee to decide whether considerations of public interest demanded at that time a full dress public investigation [of Delaney.] 199 F.2d at 114. (emphasis supplied)

The Court emphasized that the Delaney case involved an individual already under indictment. In a statement that portends the present situation the Court said:

We limit our discussion to the case before us, and do not stop to consider what would be the effect of a public legislative hearing, causing damaging publicity relating to a public official not then under indictment. Such a situation may present important differences from the instant case. In such a situation the investigative function of Congress has its greatest utility: Congress is informing itself so that it may take appropriate legislative action; it is informing the Executive so that existing laws may be enforced; and it is informing the public so that democratic processes may be brought to bear to correct any disclosed executive laxity. Also, if as a result of such legislative hearing an indictment is eventually procured against the public official, then in the normal case there would be a much greater lapse of time between the publicity accompanying the public hearing and the trial of the subsequently indicted official than would be

the case if the legislative hearing were held while the accused is awaiting trial on a pending indictment. 199 F.2d at 115.

In his concurring opinion in Hutcheson v. United States, 369 U.S. 599 (1962) Justice Harlan observed:

. . . [S]urely a congressional committee which is engaged in a legitimate legislative investigation need not grind to a halt whenever responses to its inquiries might potentially be harmful to a witness in some distinct proceeding . . . or when crime or wrong doing is disclosed. McGrain v. Daugherty, 273 U.S. 135, 179-180. 369 U.S. at 618.

. . .

Nor can it be argued that the mere pendency of the state indictment ipso facto constitutionally closed this avenue of interrogation to the [Congressional] Committee. 369 U.S. at 613.

The recent Supreme Court decision in Doe v. Macmillan, \_\_\_\_ U.S. \_\_\_\_ 41 U.S.L.W. 4752 (1973) holds that public distribution by a congressional committee of libelous or actionable material may impose liability on persons outside the legislative branch, for example, those who do the publishing. Thus, as a practical matter, a committee might in some cases want to be satisfied with internal distribution of information so as not to subject others to liability. Nowhere in the decision, however, does the Court even hint that the judiciary has power to direct a congressional committee so to act.

It is apparent as well that a committee's legislative purpose may legitimately include the publication of information. As the Supreme Court stated in Watkins v. United States, 354 U.S. 178, 200 (1957):

[There is a] power of the Congress to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government. That was the only kind of activity described by Woodrow Wilson in Congressional Government when he wrote: "The informing function of Congress should be preferred even to its legislative function." (citation omitted). From the earliest times in its history, the Congress has assiduously performed an "informing function" of this nature.

See also Hearst v. Black, 87 F.2d 68 (D.C. Cir. 1936).

In conclusion, the Court finds that the Select Committee requests have met the two procedural requirements established by § 6005. The Court is, therefore, compelled to grant unconditionally the immunity orders sought. Inasmuch as the Court is without discretion in this matter, it is not invited to comment on the wisdom or unwisdom of granting immunity in this case or to express its opinion on the desirability or undesirability of implementing the Special Prosecutor's proposals. To comment would be not only gratuitous but graceless. The Court's decision and action, therefore, cannot be interpreted as anything more than the Court acting as it is required by the law to act.

  
Chief Judge

June 12, 1973

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

JUN 21 1973

JAMES F. DAVEY  
CLERK

In the Matter of the Application of :  
:  
UNITED STATES SENATE SELECT :  
COMMITTEE ON PRESIDENTIAL :  
CAMPAIGN ACTIVITIES :  
:

MISC. NO. 70-73

APPLICATION FOR ORDER CONFERRING IMMUNITY UPON AND  
COMPELLING TESTIMONY AND PRODUCTION OF INFORMATION  
FROM DAVID YOUNG

The Select Committee on Presidential Campaign Activities of the United States Senate, by its Counsel, hereby applies to this Court for an order conferring immunity upon and compelling David Young to testify and provide other information before this Committee pursuant to the provisions of Title 18, United States Code, Sections 6002 and 6005. In support of this application the Committee states:

1. The Select Committee on Presidential Campaign Activities, pursuant to Senate Resolution 60, Section 1(a), 93rd Congress, 1st Session, is inquiring into the extent, if any, that illegal, improper, or unethical activities were engaged in by any persons, acting individually or in combination with others, in the Presidential election of 1972, or any campaign, canvass, or other activity related to it.
2. David Young will be subpoenaed to appear before this Committee during hearings that will be held in the near future.
3. It is anticipated that Mr. Young will invoke his Constitutional privilege against self-incrimination and refuse to testify or provide other information relating to his activities that come within the scope of the investigatory authority established by Senate Resolution 60.

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4. This Application has been approved by an affirmative vote of all members of the Select Committee present, as attested to by the Certification of Samuel Dash, Chief Counsel, Senate Select Committee on Presidential Campaign Activities. The Certification is attached hereto as Exhibit 1.

5. Notice of an intention to request this order was given to the Attorney General of the United States as required by Title 18, U.S.C. § 6005 (b)(3) on June 13, 1973, as attested to by the Certificate of Service attached hereto as Exhibit 2. The Attorney General has acknowledged service of this notice and has waived his statutory right to a ten day waiting period between notification and request for the order provided for in § 6005 (b)(3), as indicated by the documents attached hereto as Exhibit 3. The Attorney General has also stated that he will not seek a deferral of the order pursuant to § 6005(c). See Exhibit 3.

Respectfully submitted,

Samuel Dash (RDR)  
Samuel Dash  
Chief Counsel  
Select Committee on Presidential  
Campaign Activities

James Hamilton (RDR)  
James Hamilton  
Assistant Chief Counsel

Ronald D. Rotunda  
Ronald D. Rotunda  
Assistant Counsel

June 21, 1973

SAM J. ERVIN, JR., CHAIRMAN  
 HOWARD H. BAKER, JR., TENN., VICE CHAIRMAN  
 HERMAN E. TALMADGE, GA. EDWARD J. GURNEY, FLA.  
 DANIEL K. INOUE, HAWAII LOWELL P. WEICKER, JR., CONN.  
 JOSEPH M. MONTOTA, N. MEX.

SAMUEL DASH  
 CHIEF COUNSEL AND STAFF DIRECTOR  
 FRED D. THOMPSON  
 MINORITY COUNSEL  
 RUFUS L. EDMISTON  
 DEPUTY COUNSEL

## United States Senate

SELECT COMMITTEE ON  
 PRESIDENTIAL CAMPAIGN ACTIVITIES  
 (PURSUANT TO S. RES. 80, 80D CONGRESS)

WASHINGTON, D.C. 20510

### CERTIFICATION OF VOTE

I, Samuel Dash, Chief Counsel of the Select Committee on Presidential Campaign Activities of the United States Senate, do hereby certify that the APPLICATION FOR ORDER CONFERRING IMMUNITY UPON AND COMPELLING TESTIMONY AND PRODUCTION OF INFORMATION FROM DAVID YOUNG filed pursuant to the provisions of Title 18, United States Code, Sections 6002 and 6005 was approved by a unanimous vote of the members of said Committee present on June 12, 1973.

Samuel Dash (ROR)  
 Samuel Dash  
 Chief Counsel

June 21, 1973

EXHIBIT 1

SAM J. ERVIN, JR., CHAIRMAN  
 HOWARD H. BAKER, JR., VICE CHAIRMAN  
 HERMAN E. TALMADGE, GA. EDWARD J. GURNEY, FLA.  
 DANIEL K. INOUE, HAWAII LOWELL P. WEICKER, JR., CONN.  
 JOSEPH M. MONTOYA, N. MEX.

SAMUEL DASH  
 CHIEF COUNSEL AND STAFF DIRECTOR  
 FRED D. THOMPSON  
 MINORITY COUNSEL  
 RUFUS L. EDMISTEN  
 DEPUTY COUNSEL

## United States Senate

SELECT COMMITTEE ON  
 PRESIDENTIAL CAMPAIGN ACTIVITIES  
 (PURSUANT TO S. RES. 80, 91st CONGRESS)

WASHINGTON, D.C. 20510

### CERTIFICATE OF SERVICE

I, Samuel Dash, do hereby certify that, on the 13th day of June, 1973, I served a notice of our intention to seek an order conferring immunity upon and compelling testimony and production of information from David Young, upon the Honorable Elliot L. Richardson, Attorney General of the United States, and Archibald Cox, Special Prosecutor, by having said notice hand delivered to them at their offices located respectfully in the Main Justice Building, 10th and Constitution Avenue, NW, Washington, DC and at 1425 K St., NW, Washington, DC. A copy of this notice is attached to this Certificate of Service.

Samuel Dash (ADR)  
 Samuel Dash  
 Chief Counsel

June 21, 1973

EXHIBIT 2



WATERGATE SPECIAL PROSECUTION FORCE

United States Department of Justice

1425 K Street, N.W.

Washington, D.C. 20005

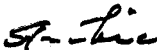
June 15, 1973

Mr. Samuel Dash  
Chief Counsel  
United States Senate  
Select Committee on Presidential  
Campaign Activities  
Washington, D.C. 20510

Dear Sam:

This is in response to your letter of June 13th to Attorney General Richardson requesting a waiver of the ten-day notice provided for in Title 18 United States Code Section 6005 with respect to an order conferring immunity on and compelling testimony of David Young. I hereby waive the ten-day notice provided for in the statute, and I shall not apply for the twenty-day deferral of issuance of an order under Section 6005 which is permitted by subsection (c) of that Section. You are free, of course, to submit this letter to the Court as evidence of my waiver of the notice requirement.

Sincerely,



ARCHIBALD COX  
Special Prosecutor

EXHIBIT 3

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Application of :

UNITED STATES SENATE SELECT  
COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES

Misc. No. 70-73

NOTICE OF APPLICATION FOR ORDER CONFERRING IMMUNITY  
AND COMPELLING TESTIMONY OF WITNESS

TO: ATTORNEY GENERAL, UNITED STATES DEPARTMENT OF JUSTICE,  
MAIN JUSTICE BUILDING, 10th and Constitution Avenue, N.W.,  
Washington, D.C. 20530

PLEASE TAKE NOTICE that on the 23rd day of June, 1973 at  
10:00 a.m., or as soon thereafter as counsel may be heard, in  
the courtroom of the Honorable John J. Sirica, Chief Judge,  
United States District Court, District of Columbia, located in  
Courtroom No. 2, United States District Courthouse, Third and  
Constitution Avenue, N.W., Washington, D.C., the undersigned,  
acting on behalf of the Select Committee on Presidential  
Campaign Activities of the United States Senate, will apply  
to the Court, pursuant to the provisions of Title 18, United  
States Code, Sections 6002(3) and 6005, for an order conferring  
immunity upon and compelling David Young to testify and provide  
other information in an inquiry conducted by said Committee.

*H. Samuel Dash (RDR)*  
Chief Counsel  
Senate Select Committee on  
Presidential Campaign Activities

Dated this 13th day of  
June, 1973

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Application of :  
:  
UNITED STATES SENATE SELECT :  
COMMITTEE ON PRESIDENTIAL :  
CAMPAIGN ACTIVITIES :  
:

MISC. NO: 70-73

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
APPLICATION FOR ORDER CONFERRING IMMUNITY UPON AND  
COMPELLING TESTIMONY AND PRODUCTION OF INFORMATION  
FROM DAVID YOUNG

The Select Committee on Presidential Campaign Activities  
of the United States Senate has applied to this Court for an Order conferring  
immunity upon and compelling David Young to testify and provide other  
information before Sections 6002 and 6005. These sections, in pertinent  
part, provide:

"Section 6002. Immunity generally.

"Whenever a witness refuses, on the basis of his  
privilege against self-incrimination to testify or provide  
other information in a proceeding before or ancillary to--

\* \* \*

"(3) either House or Congress, a joint committee of  
the two Houses, or a committee or a subcommittee of  
either House, and the person presiding over the pro-  
ceeding communicates to the witness an order issued  
under this part, the witness may not refuse to comply  
with the order on the basis of his privilege against self-  
incrimination; but no testimony or other information  
compelled under the order (or any information directly  
or indirectly derived from such testimony or other infor-  
mation) may be used against the witness in any criminal  
case, except a prosecution for perjury, giving a false  
statement, or otherwise failing to comply with the order."

"Section 6005. Congressional proceedings.

"(a) In the case of any individual who has been or  
may be called to testify or provide other information at  
any proceedings before either House of Congress, or any

Page Two

subcommittee of either House, or any joint committee of the two Houses, a United States district court shall issue, in accordance with subsection (b) of this section, upon the request of a duly authorized representative of the House of Congress or the committee concerned, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part."

"(b) Before issuing an order under subsection (a) of this section, a United States district court shall find that--

\* \* \*

"(2) in the case of a proceeding before a committee or a subcommittee of either House of Congress or a joint committee of both Houses, the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee; and

"(3) ten days or more prior to the day on which the request for such an order was made, the Attorney General was served with notice of an intention to request the order.

"(c) Upon application of the Attorney General, the United States district court shall defer the issuance of any order under subsection (a) of this section for such period, not longer than twenty days from the date of the request for such order, as the Attorney General may specify."

As the exhibits attached to the present Application indicate, the procedures required by Section 6005 have been met. All members of the Select Committee present have approved this Application. Moreover, the Select Committee, through its Counsel, has notified the Attorney General of its intention to request the instant order. The Attorney General has acknowledged notice and has waived his right to ten days delay between notice and request under Section 6005(b)(3), as well as his right to further deferral of the order pursuant to Section 6005(c).

Page Three

Because the requirements of Section 6005 have been complied with, the attached order should be entered.

Respectfully submitted,

Samuel Dash (RDR)  
Samuel Dash  
Chief Counsel  
Select Committee on Presidential  
Campaign Activities

James Hamilton (RDR)  
James Hamilton  
Assistant Chief Counsel

Ronald D. Rotunda  
Ronald D. Rotunda  
Assistant Counsel

June 21, 1973

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Application of :  
:   
UNITED STATES SENATE SELECT :  
COMMITTEE ON PRESIDENTIAL :  
CAMPAIGN ACTIVITIES :  
:

Misc. No. 70-73

ORDER CONFERRING IMMUNITY UPON AND COMPELLING  
TESTIMONY AND PRODUCTION OF INFORMATION FROM  
DAVID YOUNG

The United States Senate Select Committee on Presidential Campaign Activities, having made written application for an order conferring immunity upon David Young and compelling him to testify and provide other information before it, pursuant to Title 18, United States Code, Sections 6002 and 6005, and on Court finding that all procedures specified by § 6005 have been duly followed, it is hereby, this                      day of June, 1973,

ORDERED that David Young, in accordance with the provisions of Title 18, United States Code, Sections 6002 and 6005, shall not be excused from testifying or providing other information before the Select Committee on Presidential Campaign Activities on the ground that the testimony or other information sought may tend to incriminate him.

AND IT IS FURTHER ORDERED that said David Young appear when subpoenaed by said Committee and testify and provide such other information that is sought with respect to the matters under inquiry by said Committee.

AND IT IS FURTHER ORDERED that no testimony or other information compelled under this ORDER (or any information directly or indirectly derived from such testimony or other information) may be used against David Young in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this ORDER.

United States District Judge

## CERTIFICATE OF SERVICE

I do hereby certify that on the 21<sup>st</sup> day of June, 1973, I served copies of the attached documents upon the Honorable Elliot L. Richardson, Attorney General of the United States, Archibald Cox, Special Prosecutor, and Tony Lapham of Shea and Gardner, attorney for David Young, by causing said copies to be hand delivered to them at their respective offices.

Ronald D. Rotunda

June 21<sup>st</sup>, 1973

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Application of :  
:  
UNITED STATES SENATE SELECT :  
COMMITTEE ON PRESIDENTIAL :  
CAMPAIGN ACTIVITIES :  
:  
:  
:

MISC. NO. 70-73

MEMORANDUM OF POINTS AND AUTHORITIES SUBMITTED  
BY DAVID R. YOUNG IN RESPONSE TO APPLICATION OF  
UNITED STATES SENATE SELECT COMMITTEE ON  
PRESIDENTIAL CAMPAIGN ACTIVITIES FOR ORDER  
CONFERRING IMMUNITY UPON AND COMPELLING  
TESTIMONY AND PRODUCTION OF INFORMATION FROM  
DAVID YOUNG, AND IN RESPONSE TO PROPOSED ORDER

1. Introduction

David R. Young submits the following memorandum in response to the application for an order, and the proposed order, compelling him to testify before the Senate Select Committee on Presidential Campaign Activities (hereinafter referred to as "the Committee"), and to provide other information to the Committee, pursuant to the federal use immunity statute, 18 U.S.C. §6001 et seq.

The purpose of this memorandum is to urge an amendment of the last paragraph of the order proposed by the Committee, clarifying a point of statutory construction that bears importantly on Mr. Young's rights and liabilities under that order. The need for clarification arises mainly as a result of the recent decision in In Re Baldinger, 356 F.Supp. 153 (C.D. Cal. 1973), holding that the immunity provisions in 18 U.S.C. §6002 do not preclude the use against a witness of his compelled testimony in support of possible criminal charges relating to prior statements or testimony of the same witness on the same subject matter. If that interpretation of the statute is sound, then there is little room for doubt as to the soundness of the constitutional holding in Baldinger that the use immunity conferred by



- 2 -

18 U.S.C. §6002, where it leaves a witness exposed to the possibility that his compelled testimony could be used against him to establish criminal conduct in relation to past statements or testimony, is not an effective or adequate substitute for the Fifth Amendment privilege against compulsory self-incrimination.

Mr. Young has made a prior statement to the FBI and has given prior grand jury testimony touching matters that in all probability will be covered in any examination before the Committee. Thus Mr. Young is within that class of persons who, according to Baldinger, would be deprived of their Fifth Amendment rights if compelled to testify by an order issued pursuant to 18 U.S.C. §6002. That is true even though Mr. Young has no apprehension that his prior FBI statement or prior sworn testimony were false in any respect. To assure that his Fifth Amendment rights are preserved, Mr. Young therefore requests that the order proposed by the Committee be amended to make it clear that, contrary to the interpretation of 18 U.S.C. §6002 adopted in Baldinger, no testimony or other information may be used against Mr. Young any criminal case relating to prior conduct, including prior statements or testimony.

2. The issues in the context of  
the relevant statutory language

The legal consequences that attach when a witness testifies or provides other information pursuant to an order issued under 18 U.S.C. §6002 are spelled out in that section in the following terms:

"... no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." (Emphasis added)

These exact terms, including the underscored language, are tracked in the order proposed in this case by the Committee. The question of statutory construction is whether the underscored language refers only to possible

- 3 -

prosecutions relating to the compelled testimony, or whether as held in Baldinger that language refers also to possible prosecutions relating to prior statements and testimony of the witness. The constitutional question is whether, assuming a construction of the language that would permit use of the compelled testimony in possible prosecutions relating to prior statements or testimony, 18 U.S.C. §6002 is constitutional as applied to a witness -- such as the witness in this case -- who has made prior statements and given prior testimony or whether, again as held in Baldinger, the statute is unconstitutional as applied in such circumstances.

### 3. The issue of statutory construction

There are persuasive reasons to believe that the Baldinger decision does not reflect an accurate interpretation of 18 U.S.C. §6002, and that it defines too narrowly the scope of the immunity conferred by that section. To begin with, Baldinger appears to be in direct conflict with Kastigar v. United States, 406 U.S. 441 (1972), the Supreme Court's comprehensive decision upholding the constitutionality of the federal use immunity statute. Further, the traces of legislative history of the provision in 18 U.S.C. §6002 granting immunity against use of compelled testimony "in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order," are also at odds with the interpretation of this provision in Baldinger, as indeed is the wording of the provision itself. These considerations are discussed briefly below. So far as they concern the issue of statutory construction, they all point to a conclusion that 18 U.S.C. §6002 precludes the evidentiary use of compelled testimony in possible prosecutions relating to prior statements or testimony. However, if the contrary conclusion reached in Baldinger is correct, then so must be the conclusions reached in that case on the constitutional issue -- namely, that the use immunity conferred by the statute affords significantly less protection than the privilege against compulsory self-incrimination and that the Fifth Amendment therefore bars, as to a witness who has given prior

- 4 -

statements or testimony covering the same subject matter, enforcement of an order compelling testimony and the production of other information pursuant to 18 U.S.C. §6002.

(a) The Kastigar decision

In Kastigar v. United States, supra, decided shortly after the 1970 enactment of the federal use immunity statute, the Supreme Court reviewed and affirmed contempt judgments entered against witnesses who had refused to answer questions before a grand jury in the face of an order compelling them to do so and granting them immunity pursuant to 18 U.S.C. §6002-6003. The view expressed by the Court as to the scope of use immunity was central to its holding that the statute met constitutional standards:

"We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. . . . Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." 406 U.S. at 453 (Emphasis in opinion)

Thus the Court was emphatic in construing the immunity provisions of the statute as precluding any use of compelled testimony against a witness in criminal proceedings, and that construction was basic to the approval of the statutory procedures as coextensive with the privilege against self-incrimination. To the extent that these same immunity provisions were construed in Baldinger to permit the use of compelled testimony as evidence against a witness in connection with criminal charges relating to prior statements or testimony of the witness, that decision is fundamentally inconsistent with Kastigar.

- 5 -

(b) Legislative history and other considerations

As recognized in Baldinger, 356 F.Supp. at 157-158, what little legislative history there is on the point indicates that the proviso in 18 U.S.C. §6002 authorizing the use of compelled testimony against a witness in "a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order," refers only to prospective conduct of the witness. So, for example, the Justice Department comments on the legislation included the following:

"Title II provides that when a witness refuses on the basis of the privilege against self-incrimination to testify or to provide information in a proceeding before a Federal court or grand jury, a government agency, or either House of the Congress or a Congressional committee, testimony may be ordered, but the testimony which is compelled or information obtained from the testimony which is compelled may not be used against the witness in any criminal case. An exception of course is made for criminal offenses committed during the testimony, such as perjury and false statement, and for failure to comply with the order itself.' Hearings on S. 30 Before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 2d Sess., at 162 (1970)." (Emphasis added)

Similarly, the House Report on the legislation contained a remark to the effect that the "exception for perjury, false statements or other failure to comply with the order is probably unnecessary," 1/ and the only explanation for a remark of that kind is that the liability of a witness for offenses committed after entry of an order would be obvious even without an exception in the statute. Certainly the exception would not have been thought "probably unnecessary" if the intention was to expose witnesses to use of compelled testimony as evidence of prior offenses.

Finally, 18 U.S.C. §6002 indicates on its face that compelled testimony or other information compelled by an order may not be used as evidence of prior offenses. The statute provides that such testimony or

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1/ H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. (1970), 1970 U.S. Code Cong. & Admin. News 4018, citing United States v. Monia, 317 U.S. 424 (1943). That decision also stands for the proposition that a grand jury investigation is a "criminal case" for purposes of the Fifth Amendment and for purposes of immunity legislation. Id. at 427.

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other information may not be used against a witness "in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." (Emphasis added). The word "otherwise" simply makes no sense in this context unless it means that a prospective failure to comply with the order is the only event with which the exception is concerned, and that "perjury" and "giving a false statement" are but two examples of such a failure. If prosecutions relating to prior statements or testimony, neither of which could involve a failure to comply with the order, were within the contemplation of the exception in the statute, the word "otherwise" would obviously have been omitted.

#### 4. The position of the witness in this case

Mr. Young has given a prior statement to the FBI and has testified twice under oath concerning at least some of the matters about which he is likely to be examined by the Committee.<sup>2/</sup> He has no specific reason to expect that any compelled testimony before the Committee will differ in any material respect from his prior FBI statement or sworn testimony. Nevertheless, Mr. Young does not have access either to his FBI statement or to transcripts of his prior testimony. Obviously he does not have total recall as to the questions that were asked or the answers that were given on those occasions. In these circumstances there is at least a theoretical danger that on some point a contradiction could appear between any compelled testimony before the Committee and Mr. Young's prior FBI statement or sworn testimony.

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<sup>2/</sup> The FBI statement was taken in July 1972. The first of the two examinations under oath was a deposition taken in September 1972 and subsequently read to the Watergate grand jury in the District of Columbia. The second examination under oath took place on May 16, 1973, when Mr. Young appeared before the Watergate grand jury pursuant to an order issued by Judge Sirica under 18 U.S.C. §§6002-6003. In connection with his May 16 appearance before the grand jury, Mr. Young had no occasion to voice the concerns expressed in this memorandum, since the Baldinger decision had not yet been officially reported. His understanding at that time was that his compelled testimony could not be used against him in support of criminal charges relating to prior sworn or unsworn statements.

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Under the interpretation placed on 18 U.S.C. §6002 in the Baldinger case, Mr. Young's compelled testimony before the Committee could be used against him to establish criminal charges relating to his prior FBI statement or sworn testimony. Still worse, if Baldinger is accepted and if as much as an inadvertent contradiction appears between any compelled testimony before the Committee and prior sworn testimony before the grand jury, evidence of that fact would not only be usable against Mr. Young but might alone be sufficient to convict him.<sup>2/</sup> These are possibilities, however remote, to which Mr. Young may not be exposed without depriving him of his Fifth Amendment privilege against compulsory self-incrimination.

#### 5. Conclusion

As noted at the outset, the purpose of this memorandum is to seek an amendment of the order proposed by the Committee, clarifying the scope of the immunity conferred by 81 U.S.C. §6002, in the light of the Baldinger decision. Absent such a clarification, Mr. Young cannot determine with any certainty what protection is afforded to him by the proposed order compelling him to testify and to provide other information to the Committee. He therefore cannot determine whether that protection is coextensive with his Fifth Amendment privilege, as the Supreme Court has said in Kastigar that it must be before compulsion to testify may be exerted under the federal use immunity statute.

Mr. Young would not object to the issuance of the order proposed by the Committee if the last paragraph thereof were amended to read as follows:

"AND IT IS FURTHER ORDERED that no testimony or other information compelled under this ORDER (or any information directly or indirectly derived from such testimony or other information) may be used against David Young in any criminal case, except a prosecution for perjury or giving a false statement while testifying or providing other information pursuant to this ORDER, or otherwise failing to comply with this ORDER."

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<sup>2/</sup> See the federal false declaration statute, 18 U.S.C. §1623.-

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In consenting to the issuance of the proposed order if amended in the manner provided above, Mr. Young of course does not intend to waive any rights he may have, whether under the Committee's rules of procedure or otherwise, in connection with any appearance before the Committee.

Respectfully submitted,

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Anthony A. Lapham  
734 Fifteenth Street, N.W.  
Washington, D. C. 20005  
737-1255

Counsel for David R. Young

Dated: June 29, 1973

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Application of :

UNITED STATES SENATE SELECT : Misc. No. 70-73  
 COMMITTEE ON PRESIDENTIAL :  
 CAMPAIGN ACTIVITIES :

MEMORANDUM OF SENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES SUBMITTED IN RESPONSE TO DAVID R.  
YOUNG'S REQUEST THAT THE SELECT COMMITTEE'S PROPOSED  
ORDER BE AMENDED

This Memorandum is in response to the request of David R. Young that the Select Committee's proposed immunity order be amended to provide additional protection from the use of testimony compelled under the order to prove that he has made previous false statements which would subject him to criminal charges. The Select Committee opposes this amendment as unnecessary.

The Select Committee's proposed order, an order that this Court has previously adopted in regard to other witnesses before this Committee, tracks the provision of 18 U.S.C. § 6002 which provides an exception from immunity for "prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." Mr. Young is concerned that this exceptions clause would expose him to a "theoretical danger"<sup>1/</sup> of prosecution for previous statements that are demonstrated false or perjurious by his compelled testimony. But the language of § 6002 and its legislative history clearly indicate that the exceptions clause is meant only to apply to criminal offenses committed in

1/ Young Memorandum, p.6



connection with an immunity order.<sup>2/</sup> Indeed, the validity of this reading of the statute was established by the Supreme Court in Kastigar v. United States, 406 U.S. 441 (1972) where the Court held that the immunity provided by § 6002 was coextensive with the Fifth Amendment's protection against self-incrimination. If the statute allowed present testimony to be used in a prosecution for prior perjury and false statements, it would not provide protection coextensive with the Fifth Amendment and thus would not be constitutional. We also note that this Court, in its opinion of June 12, 1973, at p.4, confirmed the constitutionality of the statute thereby ruling out any interpretation that would afford a witness less protection than that granted by the Fifth Amendment.

The authority contrary to the foregoing interpretation of the exceptions clause of § 6002 is the recent District Court opinion in In re Baldinger, 356 F. Supp. 153 (1973), <sup>3/</sup> where the Court found that a witness before a grand jury for whom immunity was sought under 18 U.S.C. §§ 6002, 6003 could be subject to prosecution for making previous statements to the FBI if these statements were proven false by the witness' compelled testimony. Having so interpreted the statute, the Court ruled it unconstitutional as not coextensive with the Fifth Amendment privilege. Not only does the Court's interpretation

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<sup>2/</sup>The phrase "otherwise failing to comply with the order" plainly denotes that the statute refers only to a witness' committing perjury or making a false statement while testifying under an immunity order. Moreover, in hearings before the House, the Justice Department commented that testimony which is compelled under § 6002 "may not be used against the witness in any criminal case" but that "a 7n exception of course is made for criminal offenses committed during the testimony, such as perjury and false statement, and for failure to comply with the order." Hearings on S.30 before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess., at 162 (1970) (emphasis added).

<sup>3/</sup> Notice of Appeal filed on May 10, 1973, by the U. S. Attorney for the Central District of California

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seem extraordinarily strained in view of the statute's language and legislative history, but also violates the principle that statutes are to be interpreted, if possible, to avoid their invalidation on constitutional grounds. E.g., United States v. Harriss, 347 U.S. 612, 618 (1954); United States v. CIO, 335 U.S. 106, 121-22 (1947).

To summarize, the Select Committee, while concurring with Mr. Young's position that § 6002 denies the use of immunized statements to prove prior perjury or false statements, opposes amending its proposed order because the present language of this order adheres to the language of § 6002, which, under a proper interpretation, provides the entire protection that Mr. Young seeks.

Respectfully submitted,

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Samuel Dash  
Chief Counsel

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James Hamilton, Assistant Counsel

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Ronald D. Rotunda, Assistant Counsel

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William D. Mayton, Assistant Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 3d day of July, 1973, I served copies of the attached Memorandum upon Anthony A. Lapham, attorney for David R. Young, and upon Archibald Cox, Special Prosecutor, United States Department of Justice, by causing copies to be delivered to them by hand at their respective offices.

---

William T. Mayton

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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In the Matter of the Application of

UNITED STATES SENATE SELECT COMMITTEE  
ON PRESIDENTIAL CAMPAIGN ACTIVITIES

---

MISC. NO. 70-73

RESPONSE OF SPECIAL PROSECUTOR  
TO APPLICATION OF UNITED STATES  
SENATE SELECT COMMITTEE ON  
PRESIDENTIAL CAMPAIGN ACTIVITIES  
FOR ORDER CONFERRING IMMUNITY  
UPON, AND COMPELLING TESTIMONY  
AND PRODUCTION OF OTHER INFOR-  
MATION FROM, DAVID R. YOUNG, AND  
TO YOUNG MEMORANDUM IN RESPONSE  
TO COMMITTEE PROPOSED ORDER

The Special Prosecutor, on behalf of the Attorney General, does not oppose the application made by the Senate Select Committee on Presidential Campaign Activities, pursuant to 18 U.S.C. §§6002 and 6005, for an order conferring immunity upon David R. Young and compelling Mr. Young's testimony and production of other information before the Committee.

The Special Prosecutor believes that the immunity provided by 18 U.S.C. §6002 is coextensive with the Fifth Amendment's protection against self-incrimination, and that the proposed standard form of immunity order

submitted by the Committee, without amendment, satisfies the concerns expressed by Mr. Young regarding the possible use of his testimony and other information compelled before the Committee in a prosecution for perjury or false statements against him based on earlier sworn testimony.

Respectfully submitted,

*Archibald Cox*

ARCHIBALD COX  
Special Prosecutor  
Watergate Special  
Prosecution Force  
Department of Justice  
1425 K St., N.W.  
Washington, D. C. 20005

Dated: July 4, 1973

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Response of Special Prosecutor to Application of United States Senate Select Committee on Presidential Campaign Activities for Order Conferring Immunity upon, and Compelling Testimony and Production of Other Information from David R. Young, and to Young Memorandum in Response to Committee Proposed Order has been mailed to Samuel Dash, Esquire, Chief Counsel, United States Senate Committee on Presidential Campaign Activities, Washington, D. C. 20510, and to Anthony A. Lapham, Esquire, Counsel for David R. Young, 734 Fifteenth St., N.W., Washington, D. C. 20005 this 4th day of July, 1973.

*Stephen E. Haberfeld*

STEPHEN E. HABERFELD  
Assistant Special Prosecutor

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE APPLICATION OF THE  
UNITED STATES SENATE SELECT COMMITTEE ON  
PRESIDENTIAL CAMPAIGN ACTIVITIES

MISC. NO. 70-73

(David Young)

Thursday, July 5, 1973

BEFORE THE HONORABLE CHIEF JUDGE JOHN J. SIRICA.

APPEARANCES:

RONALD D. ROTUNDA, ESQ., Senate Select Committee  
STEPHEN E. HABERFELD, Office of Special Prosecutor  
WILLIAM T. MAYTON  
STUART GERSON

ANTHONY A. LAPHAM, ESQ., for Mr. Young.

NICHOLAS SOKAL  
OFFICIAL COURT REPORTER  
4800 - F UNITED STATES COURT HOUSE  
WASHINGTON, D. C. 20001  
426 - 7454

P R O C E E D I N G S

(10:10 a.m.)

THE COURT: All right.

MR. ROTUNDA: Good morning, Your Honor.

May it please the Court. Ronald D. Rotunda, Assistant Counsel, U.S. Senate Select Committee on Presidential Campaign Activities. I am a member of good standing of the Bar of this Court and I move for the admission for the purpose of this case, Mr. William T. Mayton, a member of the Bar of the Superior Court of the District of Columbia.

THE COURT: Motion granted. Any other motions?

THE DEPUTY CLERK: Mr. Stuart Gerson, Assistant U.S. Attorney will move for admission of Stephen Haberfeld.

MR. GERSON: Good morning, Your Honor. It is my pleasure to move pro hac vice for the admission of Mr. Stephen Haberfeld, a member of the Bar of New York and of Pennsylvania. This is my only motion before this Court this morning and I ask permission to leave.

THE COURT: Granted. Very well. Are counsel ready?

MR. MAYTON: Your Honor, my name is William T. Mayton and I represent the Senate Select Committee on Presidential Campaign Activities in the matter of the Application of the United States Senate Select Committee on Presidential Campaign Activities, Misc. No. 70-73.

The Committee is applying to this Court for an order conferring immunity upon and compelling David Young to testify before the Committee pursuant to Sections 6002 and 6005 of Title 18 USC.

Mr. Young will be subpoenaed to appear before the Committee during hearings that will be held in the near future. The Committee anticipates that Mr. Young will invoke his privilege against self-incrimination and refuse to testify before the Committee. The Committee's application for immunity for Mr. Young and an order compelling him to testify has been approved by the affirmative vote of all Committee members present. This vote is attested to by the certification of Samuel Dash, Chief Counsel for the Committee which certification has been submitted to this Court. Notice of an intention to request an order of immunity for Mr. Young has been given to the Attorney General as required by Section 6005(b)(3) of Title 18. The Attorney General has acknowledge service of this notice and has waived his statutory right to a ten-day waiting period. Also, the Attorney General has stated he will not seek a deferral of the order. The Attorney General's letter in this regard has been submitted to the Court.

In conclusion, Your Honor, the Committee has met the requirements set by Section 6005 for the issuance of this proposed order, and having complied with these requirements it is requested



that the Court issue the Committee's proposed order conferring immunity upon Mr. Young and compelling him to testify.

Thank you, Your Honor.

THE COURT: Very well. Counsel for Mr. Young, are you ready to make a statement?

MR. LAPHAM: Yes, Your Honor.

Good morning, Your Honor. My name is Anthony Lapham and I represent Mr. David Young in connection with these proceedings.

As Mr. Mayton has indicated, the matters before the Court this morning on the Senate Select Committee's application for an order compelling testimony and granting Mr. Young use immunity pursuant to Section 6002 of Title 18, U.S. Code.

The dispute before the Court is a relatively narrow one. There is no dispute as to the Committee having met the procedural requirements of the statute, nor does the dispute have to do with the meaning of the federal use immunity statute, nor does it have to do with the scope of immunity afforded by that statute. On these key issues there is full agreement between Mr. Young and the Senate Select Committee. There is also agreement as I understand it as to the constitutionality of that statute if it is interpreted as we both agree it should be. Nor is there any disagreement as to the unconstitutionality of the statute if it is given some more narrow interpretation whereby the use of Mr. Young's compelled testimony would be permitted in

support of any criminal charges relating to any past statements or past testimony given by Mr. Young in connection with the same subject matter which is compelled testimony.

THE COURT: Will you elaborate on the last statement a bit, what do you have in mind?

MR. LAPHAM: Well, the issue that does exist, Your Honor, and the disagreement that does exist is whether the proposed order submitted by the Committee is adequate to assure Mr. Young the full measure of the protection guaranteed by the use immunity statute. The relevant paragraph of the order is the final paragraph which tracks the statutory language and provides and I am quoting:

"It is further ordered that no testimony or other information compelled under this order (or any information directly or indirectly derived from such testimony or other information) may be used against David Young in any criminal case except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this order."

THE COURT: What is your interpretation of that language?

MR. LAPHAM: As set forth in the memorandum filed with this court on June 29, as I understand this is an interpretation of the statute which the Committee counsel agrees, the language means that any compelled testimony of Mr. Young's could be used in connection with a prosecution for perjury or giving a false

statement while responding to the order of this Court, that is to say that the exception is a prospective one. The words "except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this order" refer to the statute as I understand and the Committee's interpretation of the statute to future conducts of the witness. Those words do not refer to prosecutions that may be made for prior testimony Mr. Young has given with the same subject matter or past statements Mr. Young may have given in connection with the same subject matter.

THE COURT: The statute doesn't say that, does it?

MR. LAPHAM: The statute is not precise as to the meaning of this exception clause and that is the consideration that prompted me to file my memorandum.

THE COURT: In other words you think Mr. Young should be protected if by chance he has made a statement we'll say, to an FBI agent or someone under oath, not before the Committee?

MR. LAPHAM: Right.

THE COURT: That immunity statute should protect him as to that.

MR. LAPHAM: I don't say it should protect him against a prosecution on account of the falsity of any prior statement or on account of falsity of any prior testimony, I do say that the statute protects him against use of his compelled testimony

to prove any charges that may relate to any prior statements or any prior testimony.

THE COURT: The language of the statute seems to be clear and unambiguous to me: indirectly derived from any such testimony or other information may be used against the witness in any criminal case except a prosecution for perjury.

Now, if he commits perjury before the Senate Select Committee it is clear he can be prosecuted.

MR. LAPHAM: No question about that, Your Honor.

THE COURT: Do you want to go beyond that?

MR. LAPHAM: No, I don't want to go beyond it; I want an order that indicates that is the only use that can be made of the compelled testimony and the compelled testimony cannot be used in connection with any prosecution or any criminal charges that may relate to any prior testimony or prior statements. I want the order to reflect the interpretation of the statute such that these words in this exception clause relate only to prospective conduct of the witness and not past criminal conduct of the witness.

I might say, Your Honor, we have no specific reason to fear any prosecution relating to any prior statements made by Mr. Young or any prior testimony given by Mr. Young, but feel we are entitled to the fullest protection this statute affords and must afford if it is to be consistent with Mr. Young's

constitutional rights.

Now the case that prompted the filing of the memorandum that we filed on June 29 is a recent decision in the Central District of California, In Re Baldinger, decided April of this year.

THE COURT: Decided by Judge Ferguson.

MR. LAPHAM: Yes, sir, it was. That decision puts on the statute an interpretation contrary to the one I ask be put on and contrary to one the Senate Select Committee agrees is the correct one. What the decision does is create doubt as to meaning of the exception clause in the last paragraph of the Committee's order. I am asking that doubt be clarified by language amending the order and I have set forth the amendment that I desire on page 7 of the memorandum filed on June 29.

As I indicated at the outset, Your Honor, this is not an interpretation as to which there is any disagreement between Mr. Young and the Senate Select Committee. They agree the interpretation is correct. They take, however, the position there is no need to amend the order since the order attracts the statutory language and the interpretation would give me the protection I seek. On the other hand I don't want somewhere down the line to be faced with the need to interpret the order or contention Mr. Young's testimony can be used in support of any criminal charges relating to past conduct. What I want is an order clearly expressing Mr. Young's rights and liabilities under the

statute and those are rights and liabilities the Committee agrees he has.

THE COURT: All right, I understand your position.

MR. LAPHAM: If I could be helpful any further to the Court?

THE COURT: I think I understand your position. Let me ask counsel for the Committee, or Prosecutor rather.

MR. HABERFELD: Your Honor, I am Stephen Haberfeld, and I am an Assistant Special Prosecutor.

We have filed with the Court this morning and handed to your court clerk this morning a response to the application by the Senate Select Committee and the response to Mr. Young's memorandum.

With respect to the application we certainly do not oppose the grant of immunity to Mr. Young for his testimony before that Committee.

With respect to the memorandum, we take the position that we interpret the statute in exactly the same fashion as it has been represented to you this morning by the Committee counsel and by Mr. Lapham. We, on the other hand, do not see that the concern expressed on behalf of Mr. Young is one that is not already covered by the proposed form of order submitted to Your Honor. We believe the statute is clear that the interpretation by everyone present is in perfect agreement and we would think that the amendment suggested to the proposed order

is unnecessary.

THE COURT: All right, sir.

I have considered the matter raised by Mr. Lapham.

The Court agrees that in order to be constitutionally valid an order compelling testimony must bar use of that testimony in any prosecution of the witness for prior false statements or perjury. Otherwise the immunity is not coextensive with the Fifth Amendment privilege as required. The Court is of the opinion, however, Section 6002 as written, and the proposed order as written affords such protection. The exception provisions of 6002 states that a witness's testimony may be used against him only in a prosecution for perjury, giving false statements, or otherwise failing to comply with the order.

The Court construes that provision as having reference only to the testimony given by the witness pursuant to the immunity order. It has no application to prior statements or testimony.

That being the case, the immunity order drafted by the Senate Committee quoting verbatim the exceptions provision of 6002 gives Mr. Young the protection he seeks. There is no need for revision.

I will therefore sign the order submitted. The Court will file a brief opinion to accompany this immunity order within the next few days. The opinion will set forth the construction

of Section 6002 I have just explained, the Court's reasoning and its disagreement with the Baldinger decision.

All right.

\* \* \*

CERTIFICATE

It is certified the foregoing is the official transcript of proceedings indicated.

*Nicholas Sokal*  
NICHOLAS SOKAL  
Official Reporter



UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

FILED

JUL 5 1973

In the Matter of the Application of :  
:  
UNITED STATES SENATE SELECT :  
COMMITTEE ON PRESIDENTIAL :  
CAMPAIGN ACTIVITIES :  
:

JAMES F. DAVEY, Clerk

Misc. No. 70-73

ORDER CONFERRING IMMUNITY UPON AND COMPELLING  
TESTIMONY AND PRODUCTION OF INFORMATION FROM  
DAVID YOUNG

The United States Senate Select Committee on Presidential Campaign Activities, having made written application for an order conferring immunity upon David Young and compelling him to testify and provide other information before it, pursuant to Title 18, United States Code, Sections 6002 and 6005, and on Court finding that all procedures specified by § 6005, have been duly followed, it is hereby, this 5th day of July, 1973,

ORDERED that David Young, in accordance with the provisions of Title 18, United States Code, Sections 6002 and 6005, shall not be excused from testifying or providing other information before the Select Committee on Presidential Campaign Activities on the ground that the testimony or other information sought may tend to incriminate him.

AND IT IS FURTHER ORDERED that said David Young appear when subpoenaed by said Committee and testify and provide such other information that is sought with respect to the matters under inquiry by said Committee.

AND IT IS FURTHER ORDERED that no testimony or other information compelled under this ORDER (or any information directly or indirectly derived from such testimony or other information) may be used against David Young in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this ORDER.

(N) Special Prosecutor  
U.S. Senate Select Committee  
Anthony G. Lepore, Esq.

John F. Sirica  
United States District Judge

A. J. VANDEVER  
J. J. VANDEVER  
J. J. VANDEVER

(COPY FOR: MR ROTUNDA)

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

IN RE: APPLICATION OF THE UNITED STATES ]  
 SENATE SELECT COMMITTEE ON PRESIDENTIAL ] Misc. No. 70-73  
 CAMPAIGN ACTIVITIES ]

OPINION

FILED  
 JUL 9 1973  
 JAMES F. DAVEY, Clerk

The Senate Select Committee on Presidential Activities (Committee) has applied to this Court for an order conferring immunity upon and compelling the testimony of David R. Young pursuant to Title 18, United States Code §§ 6002 and 6005. The Attorney General, as represented by the Watergate Special Prosecutor, has waived the statutory 10-day notice requirement and the 20-day deferral period. The witness, Mr. Young, has no objection to entry of the immunity order sought by the Committee, but raises a point of statutory construction bearing on the form of the order. The problem centers on the exceptions proviso of § 6002, Title 18, and the construction given that proviso in a recent California case, In Re Baldinger, 356 F. Supp. 153 (C.D. Cal. 1973).

Section 6002 comprises a general definition of "use immunity" and is incorporated by reference in subsequent sections of the statute, §§ 6003-6005, which relate use immunity to grand jury, administrative and congressional proceedings. The final clause of § 6002, the exceptions proviso, bars the use of immunized testimony for purposes of prosecuting the witness except in a "prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." On its face, this language applies only to the testimony for which immunity is given. As Mr. Young notes, however, the Baldinger decision has construed the provision otherwise.

In Baldinger, a grand jury witness opposed immunity on the ground that § 6002 did not preclude the use of her compelled testimony in a possible prosecution for prior false statements to FBI agents. The court there agreed that the statute left open such a possibility and therefore found § 6002 unconstitutional as applied. Mr. Young dissents from this interpretation, but to resolve any doubt, he suggests that the Court modify the immunity order proposed by the Committee, which in its present form tracks the § 6002 proviso, so as to eliminate any possibility that his Senate testimony might be used in a criminal action involving prior statements or testimony. <sup>1/</sup>

The Court cannot acquiesce in the Baldinger construction of § 6002. The statute's language, its legislative history, and the well-established principle that wherever reasonable, statutes must be read so as to preserve their constitutionality, <sup>2/</sup> all combine to affirm that the exceptions proviso has a prospective application only. The Court holds that the statute and proposed immunity order, as written, satisfy the witness' concerns, and no amendment is needed.

The Baldinger decision presents what may be a permissible interpretation of the § 6002 proviso, but that interpretation is by no means a necessary one. Indeed, a natural reading favors a conclusion

<sup>1/</sup> The witness proposes the following paragraph. The underlined portion is that which is offered by way of clarifying amendment.

AND IT IS FURTHER ORDERED that no testimony or other information compelled under this ORDER (or any information directly or indirectly derived from such testimony or other information) may be used against David Young in any criminal case, except in a prosecution for perjury or giving a false statement while testifying or providing other information pursuant to this ORDER or otherwise failing to comply with this ORDER.

In his memorandum, Mr. Young emphasizes that he has no reason to anticipate a prosecution for prior false statements or perjured testimony, rather he is acting out of an abundance of caution.

<sup>2/</sup> See e.g., *United States v. Harriss*, 347 U.S. 612, 618 (1954) and *United States v. CIO*, 335 U.S. 106, 121-22 (1947).

just the opposite of that reached in Baldinger. As pointed out by Mr. Young, the word "otherwise," for example, makes no sense in the context of the statute unless it means that a prospective failure to comply with the order is the only event with which the exception is concerned, and that "perjury" and "giving a false statement" are but two examples of such a failure to comply.<sup>3/</sup> If prosecutions relating to earlier statements or testimony were within the contemplation of the exception, the word "otherwise" would have been omitted.

Congress, as evidenced in the legislative history of § 6001, et. seq.,<sup>4/</sup> was well aware of the limitations which must be imposed on the use of compelled testimony to make immunity co-extensive with the Fifth Amendment privilege. The case authority extant at the time made it clear that testimony could not constitutionally be compelled if it were subject to use, direct or indirect, in support of criminal charges against the witness. It is inconceivable that Congress, in its specific attempt to devise a constitutionally sound use immunity statute, should have intended or permitted exceptions to the use of compelled testimony other than the obvious ones for offenses committed in the course of testimony.<sup>5/</sup>

<sup>3/</sup> "[N]o testimony or other information compelled under the order . . . may be used against the witness in any criminal case except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." Title 18, U.S.C. § 6002. (Emphasis added).

<sup>4/</sup> See e.g., Senate Report No. 91-617, 91st Congress, 1st Session, (Dec. 16, 1969) at 55 and 56.

<sup>5/</sup> The House Report referred to the exceptions proviso as "probably unnecessary," in other words, the liability of a witness for offenses committed while testifying (or refusing to comply with the order) is probably obvious without any specific exception in the statute. The statement of exceptions was not intended to go beyond the apparent, but was included simply as a matter of caution. [H.R. Rep. No. 91-1549, 91st Congress, 2nd Session (Sept. 30, 1970) at 42.]

Note also the Justice Department's comments at hearings on the immunity bill: "An exception of course is made for criminal offenses committed during the testimony, such as perjury and false statement and for failure to comply with the order itself." [Hearings on S. 30 before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Congress, 2nd Session, (June 10, 1970) at 162.]

It strains the language of § 6002 to read it as having any other than a prospective application. Not only is the statute susceptible of a constitutional interpretation, the Supreme Court itself has found that it fully satisfies the Fifth Amendment's proscriptions. <sup>6/</sup> Construing § 6002, then, in the specific case now before the Court, the immunity order as drafted by the Committee protects Mr. Young against any prosecutorial use of his Senate testimony, direct or indirect, the sole exception being that if Mr. Young Perjures himself before the Senate Committee or otherwise fails to comply with the instant order, his testimony may be used in prosecuting him for such offenses. The procedural requirements of § 6005 being met, the immunity order will be entered as requested.

*John J. Sirica*  
Chief Judge

A TRUE COPY

JAMES F. DAVEY, Clerk,

By *James P. Capitanio*  
Deputy Clerk

July 9<sup>th</sup>, 1973

6/ Kastigar v. United States, 406 U.S. 441 (1972).

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

In Re: :  
:   
UNITED STATES SENATE SELECT COMMITTEE :  
:   
ON PRESIDENTIAL CAMPAIGN ACTIVITIES :

MISC. NO. 70-73

PETITION FOR WRIT OF HABEAS CORPUS  
AD TESTIFICANDUM

FILED ✓  
JUL 20 1973  
JAMES F. DAVEY, Clerk

The United States Senate Select Committee on Presidential Campaign Activities, by its counsel, respectfully represents to the Court as follows:

1. One E. Howard Hunt is a necessary witness at hearings before said Committee.

2. The said E. Howard Hunt is currently in the custody of the United States Marshal, District of Connecticut; and the Warden, Danbury Federal Correctional Institution.

WHEREFORE, the petitioner moves that this Court issue a Writ of Habeas Corpus Ad Testificandum, directed to the United States Marshal, District of Connecticut; and the Warden, Danbury Federal Correctional Institution, ordering the release of the said E. Howard Hunt into the custody of the United States Marshal in and for the District of Columbia, or into the custody of one of his authorized deputies, for return to this District to testify before the Select Committee

relative to the above-captioned matter.

Samuel Dash (RDR)  
 Samuel Dash  
 Chief Counsel

James Hamilton (RDR)  
 James Hamilton  
 Assistant Chief Counsel

Ronald D. Rotunda  
 Ronald D. Rotunda  
 Assistant Counsel

Let this Writ of Habeas Corpus Ad Testificandum issue as of  
 this 20<sup>th</sup> day of July 1973.

John J. Sirica  
 CHIEF JUDGE, JOHN J. SIRICA

*James P. Capitanio*

COPIES FOR: RONALD ROTUNDA  
ASSISTANT COUNSEL FOR  
COMMITTEE

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

In Re: \_\_\_\_\_ :  
:   
UNITED STATES SENATE SELECT COMMITTEE : MISC. NO. 70-73 :  
:   
ON PRESIDENTIAL CAMPAIGN ACTIVITIES : \_\_\_\_\_ :

TO: United States Marshal, District of Columbia; United States Marshal, District of Connecticut, Warden, Danbury Federal Correctional Institution.

You are hereby commanded to produce the body of E. Howard Hunt, by you imprisoned and detained as it is said to the United States Marshal for the District of Columbia, or one of his authorized deputies, so that he may produce on July 24, at 5:00 p.m., the said E. Howard Hunt under safe and secure conduct before the Senators and Staff on the United States Senate Select Committee on Presidential Campaign Activities, Room G 308, New Senate Office Building, at First and Constitution, N.E., for the purpose of giving testimony before said Committee, and after said prisoner shall have given his testimony on the above matter, that he be returned by the said United States Marshal for the District of Columbia, or one of his deputies to the custody from whence he came.

WITNESS the Honorable Chief Judge  
of said Court the 20th day of  
July, 1973

JAMES F. DAVEY, Clerk  
By: James P. Capitanio  
James P. Capitanio, Deputy Clerk

EXECUTED this Writ in the above-entitled case this \_\_\_\_\_ day  
of July, 1973.

UNITED STATES MARSHAL

By: \_\_\_\_\_



SUMMONS IN A CIVIL ACTION

CIV. Ia (2-64)  
(Formerly D. C. Form No. 45a Rev. (6-69))

## United States District Court

FOR THE

District of Columbia

1593-73

CIVIL ACTION FILE NO. \_\_\_\_\_

SENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES, suing in its own  
name and in the name of the UNITED STATES,  
et al

Plaintiff s

v.

SUMMONS

RICHARD M. NIXON, individually and as  
President of the United States

Defendant

To the above named Defendant :

You are hereby summoned and required to serve upon

SAMUEL DASH  
Chief Counsel

plaintiff's attorney , whose address is

United States Senate  
Washington, D. C. 20510

an answer to the complaint which is herewith served upon you, within 60 days after service of this  
summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be  
taken against you for the relief demanded in the complaint.

JAMES F. DAVEY

Clerk of Court.

Deputy Clerk.

Date: August 9, 1973

[Seal of Court]

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

## RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the

9<sup>th</sup>

day of

August

1973,

I received this summons and served it together with the complaint herein as follows:

Upon J. Fred Bughardt, Special  
 Counsel to the President, who ~~was~~  
~~accepted~~ accepted  
 service on the President's behalf, at the  
 Special Counsel's office, E. O. B., Washington, D.C.  
 (Rm 1882)

## MARSHAL'S FEES

Travel \$

Service

United States Marshal.

By

*James H. ...*  
*Ronald D. Rotunda*  
 Deputy United States Marshal.

Subscribed and sworn to before me, a

Notary Public

this 13<sup>th</sup>

day of August, 1973

[SEAL]

My Comm. Expires May 13, 1975

*Robert H. ...*  
 District of Columbia

Note:—Affidavit required only if service is made by a person other than a United States Marshal or his Deputy.

No. 1593-73

United States District Court

FOR THE District of Columbia

Senate Select Committee

et al.,

v. Nixon

## SUMMONS IN CIVIL ACTION

days

Returnable not later than

after service.

*Samuel Dash*  
*Ronald D. Rotunda*  
*James H. ...*  
 Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES, suing in its own  
name and in the name of the UNITED  
STATES,

and

SAM J. ERVIN, JR.; HOWARD H. BAKER, JR.;  
HERMAN E. TALMADGE; DANIEL K. INOUE;  
JOSEPH M. MONTOYA; EDWARD J. GURNEY;  
and LOWELL P. WEICKER, JR., as United  
States Senators who are members of the  
Senate Select Committee on Presidential  
Campaign Activities.

United States Senate  
Washington, D.C. 20510

Plaintiffs

v.

RICHARD M. NIXON, individually and as  
President of the United States.

The White House  
Washington, D.C. 20500

Defendant

FILED	1973
AUG 9	1972
JAMES F. DAVEY CLERK	

Civil  
Action  
No.

1593-73

COMPLAINT FOR DECLARATORY JUDGMENT,  
MANDATORY INJUNCTION AND MANDAMUS

1. This action seeks a declaratory judgment, a mandatory injunction and a writ of mandamus to direct Richard M. Nixon, individually and as President of the United States, to comply with two subpoenas duces tecum, duly served upon him by the Senate Select Committee on Presidential Campaign Activities pursuant to its authority under Senate Resolution 60, 93d Congress, 1st Session (1973), attached hereto as Exhibit A.

2. This action arises under Article I of the Constitution of the United States, which vests investigative and legislative powers in the Congress of the United States, and under Article II of the Constitution of the United States, which vests executive powers in the President of the United States.

- 2 -

Parties

3. The plaintiff Senate Select Committee on Presidential Campaign Activities is a duly authorized and constituted committee of the Senate of the United States. It was created pursuant to S. Res. 60, which was enacted by a unanimous vote of the Senate on February 7, 1973. Under S. Res. 60, the Select Committee is empowered to investigate and study "illegal, improper or unethical activities" in connection with the Presidential campaign and election of 1972 and to determine the necessity of new legislation "to safeguard the electoral process by which the President of the United States is chosen." The Select Committee is further empowered by a standing order of the Senate, Senate Resolution 262, 70th Congress, 1st Session (May 28, 1928), attached hereto as Exhibit B, "to bring suit on behalf of and in the name of the United States in any court of competent jurisdiction if the committee is of the opinion that the suit is necessary to the adequate performance of the powers vested in it or the duties imposed on it by the Constitution, resolution of the Senate, or other law."

4. The plaintiffs Senator Sam J. Ervin, Jr., of North Carolina (Chairman), Senator Howard H. Baker, Jr., of Tennessee (Vice Chairman), Senator Herman E. Talmadge of Georgia, Senator Daniel K. Inouye of Hawaii, Senator Joseph M. Montoya of New Mexico, Senator Edward J. Gurney of Florida, and Senator Lowell P. Weicker, Jr., of Connecticut are duly designated members of the plaintiff Senate Select Committee on Presidential Campaign Activities. Each of the aforementioned members of the Select Committee is suing in his official capacity as a member of that Committee.

- 3 -

5. The defendant Richard M. Nixon is President of the United States and was a candidate for that office in the 1972 Presidential campaign and election. He is sued in both his official and individual capacity.

#### Jurisdiction

6. The jurisdiction of this Court rests on 28 U.S.C. §1331, granting to this Court "original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." This case arises under the Constitution of the United States. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

7. The jurisdiction of this Court further rests on 28 U.S.C. §1345, granting to this Court "original jurisdiction of all civil actions, suits or proceedings commenced by the United States,..." and on Article III of the Constitution of the United States, vesting in this Court jurisdiction over "Controversies to which the United States /is/ a Party." The plaintiff Select Committee is authorized to bring this suit "on behalf of and in the name of the United States" by virtue of S. Res. 262.

8. The jurisdiction of this Court further rests on 28 U.S.C. §1361, granting to this Court "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

9. The jurisdiction of this Court further rests on the Administrative Procedure Act, 5 U.S.C. §701-706, giving this Court jurisdiction to remedy any "legal wrong" suffered by the plaintiffs as the result of Presidential action for which no

adequate review proceeding is otherwise available.

10. In order to aid and supplement the exercise of this Court's jurisdiction under the foregoing sections of the United States Code and the United States Constitution, the plaintiffs invoke the authority of this Court to render declaratory judgments and grant other relief under 28 U.S.C. §§ 2201 and 2202, and to issue "all writs necessary or appropriate in aid of... [its] jurisdiction [n] and agreeable to the usages and principles of law" under 28 U.S.C. §1651.

#### Statement of Facts

11. By virtue of Sec. 3 (a) (5) of S. Res. 60, the plaintiff Select Committee is empowered

"...to require by subpoena or order any department, agency, officer, or employee of the executive branch of the United States Government, or any private person, firm, or corporation, or any officer or former officer or employee of any political committee or organization to produce for its consideration or for use as evidence in its investigation and study any books, checks, canceled checks, correspondence, communications, documents, papers, physical evidence, records, recordings, tapes, or materials relating to any of the matters or questions it is authorized to investigate and study which they or any of them may have in their custody or under their control;..."

12. Pursuant to this section, the plaintiff Select Committee, on July 23, 1973, addressed two subpoenas duces tecum, signed by its Chairman, to "President Richard M. Nixon, The White House, Washington, D.C.," which sought specified material within the defendant President's sole possession, custody or control. Both subpoenas were duly served on that date. The two subpoenas, with their proof of service, are attached hereto as Exhibits C and D.

13. The subpoena appended as Exhibit C directed the defendant President to make available to the Select Committee certain specified electronic tapes that recorded personal conversations

-5-

"between President Nixon and John Wesley Dean, III, discussing alleged criminal acts occurring in connection with the Presidential election of 1972 which the Committee is authorized to investigate pursuant to Senate Resolution 60." [Emphasis added]

14. The subpoena appended as Exhibit D directed the defendant President to make available to the Select Committee documents and other materials "relating directly or indirectly to [an] attached list of individuals and to their activities, participation, responsibilities or involvement in any alleged criminal acts related to the Presidential election of 1972 which the Committee is authorized to investigate pursuant to Senate Resolution 60." [Emphasis added]

15. Both of the aforesaid subpoenas were returnable on July 26, 1973, at 10 a.m. at the Caucus Room (Room 318), Old Senate Office Building. Neither on that date nor on any other date has the defendant President complied with the subpoenas or otherwise made available to the Select Committee the materials demanded by the subpoenas. The defendant President's refusal to comply with the subpoenas was announced in a letter of July 25, 1973, which was addressed to Senator Sam J. Ervin, Jr., Chairman of the Select Committee, and received by him on July 26, 1973. (Said letter is appended hereto as Exhibit E.) In justification of his refusal to comply with the subpoenas, the defendant President relied in part on reasons stated in letters dated July 6 and July 23, 1973, from him to the Chairman (which are appended hereto as Exhibits F and G). Thus the defendant President did willfully and intentionally refuse to comply with either subpoena, in whole or in part.

16. At no time has the defendant President moved in this

-6-

Court or any other Court to quash, modify or narrow the scope of either subpoena.

17. At no time has the defendant President denied that he has the sole possession, custody and control of all the materials requested in the aforesaid subpoenas or denied that he is capable of submitting those materials to the Select Committee in compliance therewith. In a letter dated July 23, 1973, to the Chairman of the Select Committee, the defendant President stated that "the tapes, which have been under my sole personal control, will remain so." (See Exhibit G, appended hereto.)

18. The electronic tapes and other materials sought by the aforesaid subpoenas, which relate to alleged criminal acts in connection with the Presidential campaign and election of 1972, are relevant to the subject matters of the Select Committee's investigation pursuant to S. Res. 60. With respect to the tapes, the defendant President, in his letter dated July 23, 1973, to the Chairman of the Select Committee (Exhibit G hereto), has conceded the relevance of those tapes to the Select Committee's investigation, stating:

"The fact is that the tapes would not finally settle the central issues before your Committee. Before their existence became publically known, I personally listened to a number of them. The tapes are entirely consistent with what I know to be the truth and what I have stated to be the truth. However, as in any verbatim recording of informal conversations, they contain comments that persons with different perspectives and motivations would inevitably interpret in different ways."

Moreover, sworn testimony of John Wesley Dean, III, and H. R. Haldeman before the Select Committee has demonstrated that the subject matter of the five specified conversations falls within the investigatory jurisdiction of the Select Committee. (See Exhibit H hereto.) Furthermore, the defendant President, acting through his Special Counsel, has revealed alleged



-7-

facts demonstrating that the subject matter of these conversations is within the Select Committee's jurisdiction. (See Exhibit I hereto.)

Cause of Action

19. The defendant President's refusal and failure to make available the electronic tapes and other materials in response to the Select Committee's lawfully issued subpoenas are unlawful, unwarranted and in breach of his legal duty to respond to and to comply with such subpoenas.

20. The defendant President's refusal and failure to make available said electronic tapes and other materials cannot be excused or justified by resort to any Presidential power, prerogative or privilege.

21. If there be any doctrine of Presidential power, prerogative or privilege that protects materials in the possession, custody or control of the President, such a doctrine does not extend to the protection of materials relating to alleged criminal acts and thus cannot justify the refusal of the defendant President to respond to or comply with the two subpoenas.

22. If there be any Presidential power, prerogative or privilege that renders confidential and protects materials in the possession, custody or control of the President, that confidentiality has been breached and the alleged power, prerogative or privilege has been waived in regard to certain, if not all, of the materials sought by the Select Committee's subpoenas because the defendant President has himself partially revealed the contents of these materials and has permitted his agents and subordinates, both present and past, to reveal portions or versions of these materials. The breach of confidentiality

and the waiver of any alleged Presidential power, prerogative, or privilege are the result of the following actions (among others):

(a) The defendant President's statement of May 22, 1973, that:

"Executive privilege will not be invoked as to any testimony concerning possible criminal conduct or discussions of possible criminal conduct, in the matters presently under investigation, including the Watergate affair and the alleged cover-up."

(The defendant President's entire statement of this date is appended as Exhibit J.)

(b) The communications by the defendant President and his agents asserting that the defendant President would not invoke executive privilege or the attorney client privilege in regard to the testimony of certain present and former aides before the Select Committee. (See, e.g., Exhibit K hereto.)

(c) The communications by the defendant President's counsel to the Select Committee purporting to summarize certain Presidential meetings and telephone conversations with John Wesley Dean, III, which are the subject of Exhibit I.

(d) The defendant President's action in turning over certain of the tapes now under subpoena to H. R. Haldeman, a private citizen, who was instructed by the defendant President that he could listen to them.

23. The investigation of the plaintiff Select Committee is a continuing one, for which the subpoenaed electronic tapes and other materials are vitally and immediately needed if the Select Committee's mandate and responsibilities under S. Res. 60 are to be fulfilled. The defendant President's continuing refusal and failure to comply with the Select Committee's lawful subpoenas are irreparably injuring the work of the Select

-9-

Committee and the interests of the United States on whose behalf and in whose name the Select Committee sues. There is no remedy at law adequate and appropriate in the present circumstances to the resolution of this controversy, which is of widespread public interest and concern, and relief through injunction and/or mandamus is therefore in order.

24. This case presents an actual controversy and is therefore appropriate for declaratory and other relief pursuant to 28 U.S.C. §§2201 and 2202.

25. The public interest in, and need for, the swift completion of the functions of the Select Committee and the unique and critical Constitutional considerations raised by the actions of the defendant President warrant expedition of this action at all stages and prompt resolution of the dispute.

Prayer

Wherefore, the plaintiffs pray that:

1. This Court issue a declaratory judgment stating that

(a) The two subpoenas duces tecum were lawfully issued by the plaintiff Select Committee, were lawfully served upon the defendant President, and must therefore be responded to, and complied with, by the defendant President.

(b) The defendant President may not refuse to respond to, or comply with, said subpoenas on the basis of any claim of separation of powers, executive privilege, Presidential prerogative or otherwise.

(c) The defendant President, by his actions in revealing, and in permitting others to reveal, the subject matters of certain of the materials sought by the subpoenas has breached the confidentiality of those materials and has waived any claim to the applicability of doctrines of separation

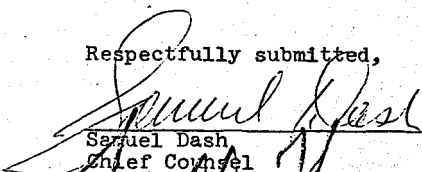
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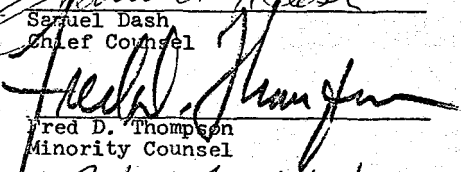
of powers, executive privilege or Presidential prerogative respecting those materials.

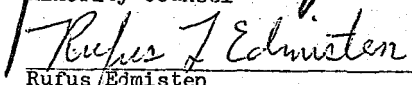
2. This Court, if such be deemed necessary, issue to the defendant President (a) a writ of mandamus and/or a mandatory injunction, if it be determined that he is withholding the subpoenaed materials in his official capacity, or (b) a mandatory injunction, if it be determined that he is withholding the subpoenaed materials in his personal capacity, directing him to make available to the plaintiff Select Committee all materials designated in the subpoenas.

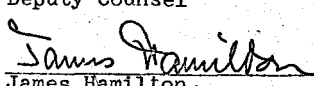
3. This Court award the plaintiffs such other and further relief as may be deemed just and equitable under the circumstances.

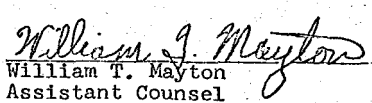
Respectfully submitted,

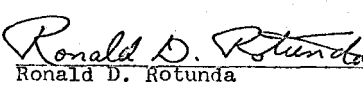
  
Samuel Dash  
Chief Counsel

  
Fred D. Thompson  
Minority Counsel

  
Rufus Edmisten  
Deputy Counsel

  
James Hamilton  
Assistant Chief Counsel

  
William T. Mayton  
Assistant Counsel

  
Ronald D. Rotunda  
Assistant Counsel

Sherman Cohn  
Eugene Gressman  
Jerome A. Barron  
Washington, D. C.  
Of Counsel

Arthur S. Miller  
Chief Consultant to  
the Select Committee  
Washington, D. C.  
Of Counsel

United States Senate  
Washington, D. C. 20510  
Telephone Number 225-0531

93D CONGRESS  
1ST SESSION

## S. RES. 60

### IN THE SENATE OF THE UNITED STATES

FEBRUARY 5, 1973

Mr. ERVIN (for himself and Mr. MANSFIELD) submitted the following resolution; which was ordered to be placed on the calendar.

FEBRUARY 7, 1973

Considered, amended, and agreed to

[Omit the part struck through and insert the part printed in italic]

## RESOLUTION

To establish a select committee of the Senate to conduct an investigation and study of the extent, if any, to which illegal, improper, or unethical activities were engaged in by any persons, acting individually or in combination with others, in the presidential election of 1972, or any campaign, canvass, or other activity related to it.

1     *Resolved,*

2     SECTION 1. (a) That there is hereby established a  
3 select committee of the Senate, which may be called, for  
4 convenience of expression, the Select Committee on Presi-  
5 dential Campaign Activities, to conduct an investigation and  
6 study of the extent, if any, to which illegal, improper, or  
7 unethical activities were engaged in by any persons, acting

1 either individually or in combination with others, in the  
2 presidential election of 1972, or in any related campaign or  
3 canvass conducted by or in behalf of any person seeking  
4 nomination or election as the candidate of any political party  
5 for the office of President of the United States in such elec-  
6 tion, and to determine whether in its judgment any occur-  
7 rences which may be revealed by the investigation and study  
8 indicate the necessity or desirability of the enactment of new  
9 congressional legislation to safeguard the electoral process  
10 by which the President of the United States is chosen.

11 (b) The select committee created by this resolution shall  
12 consist of ~~five~~ *seven* Members of the Senate, ~~three~~ *four* of  
13 whom shall be appointed by the President of the Senate  
14 from the majority Members of the Senate upon the recom-  
15 mendation of the majority leader of the Senate, and ~~two~~  
16 *three* of whom shall be appointed by the President of the  
17 Senate from the minority Members of the Senate upon the  
18 recommendation of the minority leader of the Senate. For  
19 the purposes of paragraph 6 of rule XXV of the Standing  
20 Rules of the Senate, service of a Senator as a member, chair-  
21 man, or vice chairman of the select committee shall not be  
22 taken into account.

23 (c) The select committee shall select a chairman and  
24 vice chairman from among its members, and adopt rules of  
25 procedure to govern its proceedings. The vice chairman shall  
26 preside over meetings of the select committee during the

1 absence of the chairman, and discharge such other responsi-  
2 bilities as may be assigned to him by the select committee or  
3 the chairman. Vacancies in the membership of the select com-  
4 mittee shall not affect the authority of the remaining mem-  
5 bers to execute the functions of the select committee and  
6 shall be filled in the same manner as original appointments  
7 to it are made.

8 (d) A majority of the members of the select committee  
9 shall constitute a quorum for the transaction of business, but  
10 the select committee may fix a lesser number as a quorum  
11 for the purpose of taking testimony or depositions.

12 SEC. 2. That the select committee is authorized and  
13 directed to do everything necessary or appropriate to make  
14 the investigation and study specified in section 1 (a) . With-  
15 out abridging or limiting in any way the authority conferred  
16 upon the select committee by the preceding sentence, the  
17 Senate further expressly authorizes and directs the select  
18 committee to make a complete investigation and study of the  
19 activities of any and all persons or groups of persons or orga-  
20 nizations of any kind which have any tendency to reveal the  
21 full facts in respect to the following matters or questions:

22 (1) The breaking, entering, and bugging of the  
23 headquarters or offices of the Democratic National Com-  
24 mittee in the Watergate Building in Washington, District  
25 of Columbia;

1           (2) The monitoring by bugging, eavesdropping,  
2     wiretapping, or other surreptitious means of conversa-  
3     tions or communications occurring in whole or in part in  
4     the headquarters or offices of the Democratic National  
5     Committee in the Watergate Building in Washington,  
6     District of Columbia;

7           (3) Whether or not any printed or typed or written  
8     document or paper or other material was surreptitiously  
9     removed from the headquarters or offices of the Demo-  
10    cratic National Committee in the Watergate Building in  
11    Washington, District of Columbia, and thereafter copied  
12    or reproduced by photography or any other means for  
13    the information of any person or political committee or  
14    organization;

15          (4) The preparing, transmitting, or receiving by  
16    any person for himself or any political committee or  
17    any organization of any report or information concern-  
18    ing the activities mentioned in subdivision (1), (2),  
19    or (3) of this section, and the information contained in  
20    any such report;

21          (5) Whether any persons, acting individually or  
22    in combination with others, planned the activities men-  
23    tioned in subdivision (1), (2), (3), or (4) of this  
24    section, or employed any of the participants in such  
25    activities to participate in them, or made any payments



## 5

1 or promises of payments of money or other things of  
2 value to the participants in such activities or their fam-  
3 ilies for their activities, or for concealing the truth in  
4 respect to them or any of the persons having any con-  
5 nection with them or their activities, and, if so, the  
6 source of the moneys used in such payments, and the  
7 identities and motives of the persons planning such ac-  
8 tivities or employing the participants in them;

9 (6) Whether any persons participating in any of  
10 the activities mentioned in subdivision (1), (2), (3),  
11 (4), or (5) of this section have been induced by brib-  
12 ery, coercion, threats, or any other means whatsoever  
13 to plead guilty to the charges preferred against them in  
14 the District Court of the District of Columbia or to  
15 conceal or fail to reveal any knowledge of any of the  
16 activities mentioned in subdivision (1), (2), (3),  
17 (4), or (5) of this section, and, if so, the identities  
18 of the persons inducing them to do such things, and the  
19 identities of any other persons or any committees or  
20 organizations for whom they acted;

21 (7) Any efforts to disrupt, hinder, impede, or sabo-  
22 tage in any way any campaign, canvass, or activity con-  
23 ducted by or in behalf of any person seeking nomination  
24 or election as the candidate of any political party for the  
25 office of President of the United States in 1972 by in-

1       filtrating any political committee or organization or head-  
2       quarters or offices or home or whereabouts of the person  
3       seeking such nomination or election or of any person  
4       aiding him in so doing, or by bugging or eavesdropping  
5       or wiretapping the conversations, communications,  
6       plans, headquarters, offices, home, or whereabouts of the  
7       person seeking such nomination or election or of any  
8       other person assisting him in so doing, or by exercising  
9       surveillance over the person seeking such nomination or  
10      election or of any person assisting him in so doing, or by  
11      reporting to any other person or to any political com-  
12      mittee or organization any information obtained by such  
13      infiltration, eavesdropping, bugging, wiretapping, or  
14      surveillance;

15           (8) Whether any person, acting individually or in  
16      combination with others, or political committee or orga-  
17      nization induced any of the activities mentioned in sub-  
18      division (7) of this section or paid any of the partici-  
19      pants in any such activities for their services, and, if so,  
20      the identities of such persons, or committee, or organiza-  
21      tion, and the source of the funds used by them to procure  
22      or finance such activities;

23           (9) Any fabrication, dissemination, or publication  
24      of any false charges or other false information having  
25      the purpose of discrediting any person seeking nomina-

tion or election as the candidate of any political party  
to the office of President of the United States in 1972;

(10) The planning of any of the activities mentioned in subdivision (7), (8), or (9) of this section, the employing of the participants in such activities, and the source of any moneys or things of value which may have been given or promised to the participants in such activities for their services, and the identities of any persons or committees or organizations which may have been involved in any way in the planning, procuring, and financing of such activities.

(11) Any transactions or circumstances relating to the source, the control, the transmission, the transfer, the deposit, the storage, the concealment, the expenditure, or use in the United States or in any other country, of any moneys or other things of value collected or received for actual or pretended use in the presidential election of 1972 or in any related campaign or canvass or activities preceding or accompanying such election by any person, group of persons, committee, or organization of any kind acting or professing to act in behalf of any national political party or in support of or in opposition to any person seeking nomination or election to the office of President of the United States in 1972;

1           (12) Compliance or noncompliance with any act  
2 of Congress requiring the reporting of the receipt or dis-  
3 bursement or use of any moneys or other things of value  
4 mentioned in subdivision (11) of this section;

5           (13) Whether any of the moneys or things of value  
6 mentioned in subdivision (11) of this section were  
7 placed in any secret fund or place of storage for use in  
8 financing any activity which was sought to be concealed  
9 from the public, and, if so, what disbursement or expend-  
10 iture was made of such secret fund, and the identities  
11 of any person or group of persons or committee or or-  
12 ganization having any control over such secret fund or  
13 the disbursement or expenditure of the same;

14          (14) Whether any books, checks, canceled checks,  
15 communications, correspondence, documents, papers,  
16 physical evidence, records, recordings, tapes, or mate-  
17 rials relating to any of the matters or questions the select  
18 committee is authorized and directed to investigate and  
19 study have been concealed, suppressed, or destroyed by  
20 any persons acting individually or in combination with  
21 others, and, if so, the identities and motives of any such  
22 persons or groups of persons;

23          (15) Any other activities, circumstances, materials,  
24 or transactions having a tendency to prove or disprove  
25 that persons acting either individually or in combination

1 with others, engaged in any illegal, improper, or un-  
2 ethical activities in connection with the presidential  
3 election of 1972 or any campaign, canvass, or activity  
4 related to such election;

5 (16) Whether any of the existing laws of the  
6 United States are inadequate, either in their provisions  
7 or manner of enforcement to safeguard the integrity or  
8 purity of the process by which Presidents are chosen.

9 SEC. 3. (a) To enable the select committee to make  
10 the investigation and study authorized and directed by this  
11 resolution, the Senate hereby empowers the select committee  
12 as an agency of the Senate (1) to employ and fix the com-  
13 pensation of such clerical, investigatory, legal, technical, and  
14 other assistants as it deems necessary or appropriate; (2) to  
15 sit and act at any time or place during sessions, recesses, and  
16 adjournment periods of the Senate; (3) to hold hearings for  
17 taking testimony on oath or to receive documentary or physi-  
18 cal evidence relating to the matters and questions it is author-  
19 ized to investigate or study; (4) to require by subpena or  
20 otherwise the attendance as witnesses of any persons who  
21 the select committee believes have knowledge or information  
22 concerning any of the matters or questions it is authorized to  
23 investigate and study; (5) to require by subpena or order  
24 any department, agency, officer, or employee of the execu-  
25 tive branch of the United States Government, or any private

1 person, firm, or corporation, or any officer or former officer  
2 or employee of any political committee or organization to  
3 produce for its consideration or for use as evidence in its  
4 investigation and study any books, checks, canceled checks,  
5 correspondence, communications, document, papers, physical  
6 evidence, records, recordings, tapes, or materials relating to  
7 any of the matters or questions it is authorized to investigate  
8 and study which they or any of them may have in their  
9 custody or under their control; (6) to make to the Senate  
10 any recommendations it deems appropriate in respect to the  
11 willful failure or refusal of any person to appear before it in  
12 obedience to a subpoena or order, or in respect to the willful  
13 failure or refusal of any person to answer questions or give  
14 testimony in his character as a witness during his appearance  
15 before it, or in respect to the willful failure or refusal of any  
16 officer or employee of the executive branch of the United  
17 States Government or any person, firm, or corporation, or any  
18 officer or former officer or employee of any political committee  
19 or organization, to produce before the committee any books,  
20 checks, canceled checks, correspondence, communications,  
21 document, financial records, papers, physical evidence, rec-  
22 ords, recordings, tapes, or materials in obedience to any sub-  
23 pena or order; (7) to take depositions and other testimony on  
24 oath anywhere within the United States or in any other  
25 country; (8) to procure the temporary or intermittent serv-

1 ices of individual consultants, or organizations thereof, in the  
2 same manner and under the same conditions as a standing  
3 committee of the Senate may procure such services under  
4 section 202 (i) of the Legislative Reorganization Act of  
5 1946; (9) to use on a reimbursable basis, with the prior  
6 consent of the Government department or agency concerned  
7 and the Committee on Rules and Administration, the serv-  
8 ices of personnel of any such department or agency; (10) to  
9 use on a reimbursable basis or otherwise with the prior con-  
10 sent of the chairman of any other of the Senate committees  
11 or the chairman of any subcommittee of any committee of  
12 the Senate the facilities or services of any members of the  
13 staffs of such other Senate committees or any subcommittees  
14 of such other Senate committees whenever the select com-  
15 mittee or its chairman deems that such action is necessary or  
16 appropriate to enable the select committee to make the in-  
17 vestigation and study authorized and directed by this resolu-  
18 tion; (11) to have access through the agency of any mem-  
19 bers of the select committee ~~or any of its investigatory or~~  
20 ~~legal assistants designated by it or its chairman or the rank-~~  
21 ~~ing minority member, chief majority counsel, minority coun-~~  
22 ~~sel, or any of its investigatory assistants jointly designated by~~  
23 ~~the chairman and the ranking minority member~~ to any data,  
24 evidence, information, report, analysis, or document or papers  
25 relating to any of the matters or questions which it is author-

1 ized and directed to investigate and study in the custody or  
2 under the control of any department, agency, officer, or em-  
3 ployee of the executive branch of the United States Govern-  
4 ment having the power under the laws of the United States  
5 to investigate any alleged criminal activities or to prosecute  
6 persons charged with crimes against the United States which  
7 will aid the select committee to prepare for or conduct the  
8 investigation and study authorized and directed by this reso-  
9 lution; and (12) to expend to the extent it determines nec-  
10 essary or appropriate any moneys made available to it by the  
11 Senate to perform the duties and exercise the powers con-  
12 ferred upon it by this resolution and to make the investigation  
13 and study it is authorized by this resolution to make.

14 (b) Subpenas may be issued by the select committee  
15 acting through the chairman or any other member desig-  
16 nated by him, and may be served by any person designated  
17 by such chairman or other member anywhere within the  
18 borders of the United States. The chairman of the select  
19 committee, or any other member thereof, is hereby author-  
20 ized to administer oaths to any witnesses appearing before  
21 the committee.

22 (c) In preparing for or conducting the investigation and  
23 study authorized and directed by this resolution, the select  
24 committee shall be empowered to exercise the powers con-  
25 ferred upon committees of the Senate by section 6002 of title



1 18 of the United States Code or any other Act of Congress  
2 regulating the granting of immunity to witnesses.

3 SEC. 4. The select committee shall have authority to  
4 recommend the enactment of any new congressional legis-  
5 lation which its investigation considers it is necessary or  
6 desirable to safeguard the electoral process by which the  
7 President of the United States is chosen.

8 SEC. 5. The select committee shall make a final report of  
9 the results of the investigation and study conducted by it  
10 pursuant to this resolution, together with its findings and  
11 its recommendations as to new congressional legislation it  
12 deems necessary or desirable, to the Senate at the earliest  
13 practicable date, but no later than February 28, 1974. The  
14 select committee may also submit to the Senate such interim  
15 reports as it considers appropriate. After submission of its  
16 final report, the select committee shall have three calendar  
17 months to close its affairs, and on the expiration of such  
18 three calendar months shall cease to exist.

19 SEC. 6. The expenses of the select committee through  
20 February 28, 1974, under this resolution shall not exceed  
21 \$500,000, of which amount not to exceed \$25,000 shall be  
22 available for the procurement of the services of individual  
23 consultants or organizations thereof. Such expenses shall be  
24 paid from the contingent fund of the Senate upon vouchers  
25 approved by the chairman of the select committee.

1 *The minority members of the select committee shall have one-*  
2 *third of the professional staff of the select committee (includ-*  
3 *ing a minority counsel) and such part of the clerical staff*  
4 *as may be adequate.*

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**RESOLUTION**

To establish a select committee of the Senate to conduct an investigation and study of the extent, if any, to which illegal, improper, or unethical activities were engaged in by any persons, acting individually or in combination with others, in the presidential election of 1972, or any campaign, canvass, or other activity related to it.

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By Mr. ERVIN and Mr. MANSFIELD

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FEBRUARY 5, 1973

Ordered to be placed on the calendar

FEBRUARY 7, 1973

Considered, amended, and agreed to

## S. RES. 262, 70th CONGRESS, 1st SESSION (1928)

Resolved, That hereafter any committee of the Senate is hereby authorized to bring suit on behalf of and in the name of the United States in any court of competent jurisdiction if the committee is of the opinion that the suit is necessary to the adequate performance of the powers vested in it or the duties imposed upon it by the Constitution, resolution of the Senate, or other law. Such suit may be brought and prosecuted to final determination irrespective of whether or not the Senate is in session at the time the suit is brought or thereafter. The committee may be represented in the suit either by such attorneys as it may designate or by such officers of the Department of Justice as the Attorney General may designate upon the request of the committee. No expenditures shall be made in connection with any such suit in excess of the amount of funds available to the said committee. As used in this resolution, the term "committee" means any standing or special committee of the Senate, or any duly authorized subcommittee thereof, or the Senate members of any joint committee.

UNITED STATES OF AMERICA  
CONGRESS OF THE UNITED STATES  
SUBPOENA DUCES TECUM

To: President Richard M. Nixon, The White House, Washington, D. C.

Pursuant to lawful authority, YOU ARE HEREBY COMMANDED to make available to the SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES of the Senate of the United States, on Thursday, July 26, 1973, at 10:00 o'clock a.m., at their committee room, 318, Old Senate Office Building, the following:

Any and all original electronic tapes and recorded telephone messages of the below listed conversations or oral communications, telephonic or personal, between President Nixon and John Wesley Dean III, discussing alleged criminal acts occurring in connection with the Presidential election of 1972 which the Committee is authorized to investigate pursuant to Senate Resolution 60 including but not limited to the break-ins at the Democratic National Committee offices on or about May 27, 1972, and on or about June 17, 1972, and any efforts made to conceal information or to grant executive clemency, pardons or immunity and payments made to the defendants and/or their attorneys relating to the above incidents at the dates and times of the attached list of conversations:

September 15, 1972 (personal) 5:27 p.m. to 6:17 p.m.

February 28, 1973 (personal) 9:12 a.m. to 10:23 a.m.

March 13, 1973 (personal) 12:42 p.m. to 2:00 p.m.

March 21, 1973 (personal) 10:12 a.m. to 11:55 a.m.

and 5:20 p.m. to 6:01 p.m.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

To Rufus L. Edmisten, HARRY F. LERMIN

to serve and return.

Given under my hand, by order of the  
committee, this 23rd day of July, in the  
year of our Lord one thousand nine hundred  
and seventy-three.

Sam H. Erwin, Jr.

Chairman, Senate Select Committee on  
Presidential Campaign Activities

Served on Leonard Garment, on behalf of  
The President.

Time: 6:55

Date: July 23, 1973

Place: Executive Office of the President, White House

Richard L. Edmister

Jerry F. Longue

7/23/73

Received on behalf of the President  
by: Leonard Garment  
Council to the President

UNITED STATES OF AMERICA  
CONGRESS OF THE UNITED STATES  
SUBPOENA DUCES TECUM

To: President Richard M. Nixon, The White House, Washington, D. C.

Pursuant to lawful authority, YOU ARE HEREBY COMMANDED to make available to the SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES of the Senate of the United States, on Thursday, July 26, 1973, at 10:00 o'clock a.m., at their committee room, 318, Old Senate Office Building, the following:

Any and all records, or copies of records including but not limited to, documents, logs, records, memoranda, correspondence, news summaries, datebooks, notebooks, photographs, recordings or other materials relating directly or indirectly to the attached list of individuals and to their activities, participation, responsibilities or involvement in any alleged criminal acts related to the Presidential election of 1972 which the Committee is authorized to investigate pursuant to Senate Resolution 60 including but not limited to, the break-ins of the Democratic National Committee offices on or about May 27, 1972 and on or about June 17, 1972, the surveillance, electronic or otherwise of said offices, and efforts made to conceal information or to grant executive clemency, pardons or immunity and payments made to the defendants and/or their attorneys relating to the above stated matters.



Hereof fail not, as you will answer your default under the  
pains and penalties in such cases made and provided.

TO Rufus L. Edmisten, TERRA F. LUNDEN  
to serve and return.

Given under my hand, by order of the  
committee, this 23rd day of July, in  
the year of our Lord one thousand nine  
hundred and seventy-three

Sam J. Erwin, Jr.

Chairman, Senate Select Committee on  
Presidential Campaign Activities.

Buchanan, Patrick J.

Butterfield, Alexander P.

Campbell, John

Caulfield, Jack

Chapin, Dwight

Colson, Charles

Dean, John

Ehrlichman, John

Fielding, Fred

Haldeman, H. Robert

Higby, Larry

Howard, Richard

Hunt, E. Howard

Kehrli, Bruce

Krogh, Egil

LaRue, Frederick

Liddy, G. Gordon

Magruder, Jeb Stuart

Mitchell, John

Moore, Richard A.

Shumway, DeVan

Strachan, Gordon

Timmons, William

Young, David

Ziegler, Ron

Served on: Leonard Garment, Counsel  
 Time: 6:35 President, received  
 Date: July 23, 1973 behalf of the President  
 Place: The White Executive Office Building,  
 White House

Rufus L. Edmister

Jerry F. Longue  
 7/23/73

Received on behalf of the President  
 By: Leonard Garment  
 Counsel to the President

## THE WHITE HOUSE

WASHINGTON

July 25, 1973

Dear Mr. Chairman:

White House counsel have received on my behalf the two subpoenas issued by you, on behalf of the Select Committee, on July 23rd.

One of these calls on me to furnish to the Select Committee recordings of five meetings between Mr. John Dean and myself. For the reasons stated to you in my letters of July 6th and July 23rd, I must respectfully refuse to produce those recordings.

The other subpoena calls on me to furnish all records of any kind relating directly or indirectly to the "activities, participation, responsibilities or involvement" of 25 named individuals "in any alleged criminal acts related to the Presidential election of 1972." Some of the records that might arguably fit within that subpoena are Presidential papers that must be kept confidential for reasons stated in my letter of July 6th. It is quite possible that there are other records in my custody that would be within the ambit of that subpoena and that I could, consistent with the public interest and my Constitutional responsibilities, provide to the Select Committee. All specific requests from the Select Committee will be carefully considered and my staff and I, as we have done in the past, will cooperate with the Select Committee by making available any information and documents that can appropriately be produced. You will understand, however, I am sure, that it would simply not be feasible for my staff and me to review thousands of documents to decide which do and which do not fit within the sweeping but vague terms of the subpoena.

Honorable Sam J. Ervin

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It continues to be true, as it was when I wrote you on July 6th, that my staff is under instructions to cooperate fully with yours in furnishing information pertinent to your inquiry. I have directed that executive privilege not be invoked with regard to testimony by present and former members of my staff concerning possible criminal conduct or discussions of possible criminal conduct. I have waived the attorney-client privilege with regard to my former Counsel. In my July 6th letter I described these acts of cooperation with the Select Committee as "genuine, extensive and, in the history of such matters, extraordinary." That cooperation has continued and it will continue. Executive privilege is being invoked only with regard to documents and recordings that cannot be made public consistent with the confidentiality essential to the functioning of the Office of the President.

I cannot and will not consent to giving any investigatory body private Presidential papers. To the extent that I have custody of other documents or information relevant to the work of the Select Committee and that can properly be made public, I will be glad to make these available in response to specific requests.

Sincerely,



Honorable Sam J. Ervin  
Chairman  
Select Committee on Presidential  
Campaign Activities  
United States Senate  
Washington, D. C. 20510

## THE WHITE HOUSE

WASHINGTON

The Western White House  
San Clemente

July 6, 1973

Dear Mr. Chairman:

I am advised that members of the Senate Select Committee have raised the desirability of my testifying before the Committee. I am further advised that the Committee has requested access to Presidential papers prepared or received by former members of my staff.

In this letter I shall state the reasons why I shall not testify before the Committee or permit access to Presidential papers.

I want to strongly emphasize that my decision, in both cases, is based on my Constitutional obligation to preserve intact the powers and prerogatives of the Presidency and not upon any desire to withhold information relevant to your inquiry.

My staff is under instructions to co-operate fully with yours in furnishing information pertinent to your inquiry. On 22 May 1973, I directed that the right of executive privilege, "as to any testimony concerning possible criminal conduct or discussions of possible criminal conduct, in the matters presently under investigation," no longer be invoked for present or former members of the White House staff. In the case of my former Counsel, I waived in addition the attorney-client privilege.

These acts of cooperation with the Committee have been genuine, extensive and, in the history of such matters, extraordinary.

- 2 -

The pending requests, however, would move us from proper Presidential cooperation with a Senate Committee to jeopardizing the fundamental Constitutional role of the Presidency.

This I must and shall resist.

No President could function if the private papers of his office, prepared by his personal staff, were open to public scrutiny. Formulation of sound public policy requires that the President and his personal staff be able to communicate among themselves in complete candor, and that their tentative judgments, their exploration of alternatives, and their frank comments on issues and personalities at home and abroad remain confidential. I recognize that in your investigation as in others of previous years, arguments can be and have been made for the identification and perusal by the President or his Counsel of selected documents for possible release to the Committees or their staffs. But such a course, I have concluded, would inevitably result in the attrition, and the eventual destruction, of the indispensable principle of confidentiality of Presidential papers.

The question of testimony by members of the White House staff presents a difficult but different problem. While notes and papers often involve a wide-ranging variety and intermingling of confidential matters, testimony can, at least, be limited to matters within the scope of the investigation. For this reason, and because of the special nature of this particular investigation, I have agreed to permit the unrestricted testimony of present and former White House staff members before your Committee.

The question of my own testimony, however, is another matter. I have concluded that if I were to testify before the Committee irreparable damage would be done to the Constitutional principle of separation of powers. My position in this regard is supported by ample precedents with which you are familiar and which need



- 3 -

not be recited here. It is appropriate, however, to refer to one particular occasion on which this issue was raised.

In 1953 a Committee of the House of Representatives sought to subpoena former President Truman to inquire about matters of which he had personal knowledge while he had served as President. As you may recall, President Truman declined to comply with the subpoena on the ground that the separation of powers forbade his appearance. This position was not challenged by the Congress.

It is difficult to improve upon President Truman's discussion of this matter. Therefore, I request that his letter, which is enclosed for the Committee's convenience, be made part of the Committee's record.

The Constitutional doctrine of separation of powers is fundamental to our structure of government. In my view, as in the view of previous Presidents, its preservation is vital. In this respect, the duty of every President to protect and defend the Constitutional rights and powers of his Office is an obligation that runs directly to the people of this country.

The White House staff will continue to cooperate fully with the Committee in furnishing information relevant to its investigation except in those instances where I determine that meeting the Committee's demands would violate my Constitutional responsibility to defend the office of the Presidency against encroachment by other Branches.

At an appropriate time during your hearings, I intend to address publicly the subjects you are considering. In the meantime, in the context of Senate Resolution 60, I consider it my Constitutional responsibility to decline to appear personally under any circumstances before your Committee or to grant access to Presidential files.

I respect the responsibilities placed upon you and your colleagues by Senate Resolution 60. I believe you and

- 4 -

your Committee colleagues equally respect the responsibility placed upon me to protect the rights and powers of the Presidency under the Constitution.

Sincerely,

A handwritten signature in cursive script, reading "Richard Nixon". The signature is written in dark ink and is positioned below the word "Sincerely,".

Honorable Sam J. Ervin, Jr.  
Chairman  
Select Committee on Presidential  
Campaign Activities  
United States Senate  
Washington, D. C. 20510

Enclosure

cc: Honorable Howard H. Baker

THE WHITE HOUSE  
WASHINGTON

July 23, 1973

Dear Mr. Chairman:

I have considered your request that I permit the Committee to have access to tapes of my private conversations with a number of my closest aides. I have concluded that the principles stated in my letter to you of July 6th preclude me from complying with that request, and I shall not do so. Indeed the special nature of tape recordings of private conversations is such that these principles apply with even greater force to tapes of private Presidential conversations than to Presidential papers.

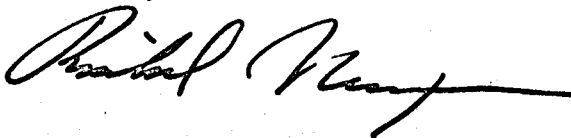
If release of the tapes would settle the central questions at issue in the Watergate inquiries, then their disclosure might serve a substantial public interest that would have to be weighed very heavily against the negatives of disclosure.

The fact is that the tapes would not finally settle the central issues before your Committee. Before their existence became publicly known, I personally listened to a number of them. The tapes are entirely consistent with what I know to be the truth and what I have stated to be the truth. However, as in any verbatim recording of informal conversations, they contain comments that persons with different perspectives and motivations would inevitably interpret in different ways. Furthermore, there are inseparably interspersed in them a great many very frank and very private comments, on a wide range of issues and individuals, wholly extraneous to the Committee's inquiry. Even more important, the tapes could be accurately understood or interpreted only by reference to an enormous number of other documents and tapes, so that to open them at all would begin an endless process of disclosure and explanation of private Presidential records totally unrelated to Watergate, and highly confidential in nature. They are the clearest possible example of why Presidential documents must be kept confidential.

Accordingly, the tapes, which have been under my sole personal control, will remain so. None has been transcribed or made public and none will be.

On May 22nd I described my knowledge of the Watergate matter and its aftermath in categorical and unambiguous terms that I know to be true. In my letter of July 6th, I informed you that at an appropriate time during the hearings I intend to address publicly the subjects you are considering. I still intend to do so and in a way that preserves the Constitutional principle of separation of powers, and thus serves the interests not just of the Congress or of the President, but of the people.

Sincerely,

A handwritten signature in dark ink, appearing to read "Philip R. Meyer", with a long horizontal flourish extending to the right.

Honorable Sam J. Ervin, Jr.  
Chairman  
Select Committee on Presidential  
Campaign Activities  
United States Senate  
Washington, D. C. 20510

## Exhibit H

This Exhibit consists of excerpts from the sworn testimony of John Wesley Dean, III, and H. R. Haldeman before the Select Committee at public session. The relevant portions of the transcript are marked with brackets; the dates of the conversations involved are added to the right-hand margin.

(DEAN)

dfm3

2229

document was forwarded directly to, or reviewed by, the President. I later learned that the President was pleased and wanted a full follow-up on the items in the memorandum. The markings on the memo are Mr. Haldeman's markings.

It was also about this time, later July -- early September, that I learned during a meeting in Mitchell's office that Mr. Rhoemer McPhee was having private discussions with Judge Richey regarding the civil suit filed by the Democrats. I believe this fact was known to Mr. Mitchell, Mr. LaRue, Paul O'Brien, and Ken Parkinson (and later again by McPhee), that Judge Richey was going to be helpful whenever he could. I subsequently talked with Mr. McPhee about this, as late as March 2nd of this year, when he told me he was going to visit the Judge in the Judge's rose garden over the weekend to discuss an aspect of the case.

Sept.  
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On September 15th the Justice Department announced the handing down of the seven indictments by the Federal Grand Jury investigating the Watergate. Late that afternoon I received a call requesting me to come to the President's oval office. When I arrived at the oval office I found

1 Haldeman and the President. The President asked me to sit  
2 down. Both men appeared to be in very good spirits and my  
3 reception was very warm and cordial. The President then told  
4 me that Bob -- referring to Haldeman -- had kept him posted on  
5 my handling of the Watergate case. The President told me I  
6 had done a good job and he appreciated how difficult a task  
7 it had been and the President was pleased that the case had  
8 stopped with Liddy. I responded that I could not take credit  
9 because others had done much more difficult things than  
10 I had done. As the President discussed the present status of  
11 the situation I told him that all that I had been able to  
12 do was to contain the case and assist in keeping it out of  
13 the White House. I also told him that there was a long way to  
14 go before this matter would end and that I certainly could make  
15 no assurances that the day would not come when this matter  
16 would start to unravel.

17 Early in our conversation the President said to me that  
18 former FBI Director Hoover had told him shortly after he had  
19 assumed office in 1969 that his campaign had been bugged in  
20 1968. The President said that at some point we should get the  
21 facts out on this and use this to counter the problems that  
22 we were encountering.

23 The President asked me when the criminal case would come  
24 to trial and would it start before the election. I told the  
25 President that I did not know. I said that the Justice

Sept.  
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2281

1 Department had held off as long as possible the return of  
2 the indictments, but much would depend on which judge got  
3 the case. The President said that he certainly hoped that the  
4 case would not come to trial before the election.

5 The President then asked me about the civil cases that  
6 had been filed by the Democratic National Committee and the  
7 common cause case and about the counter suits that we had filed.  
8 I told him that the lawyers at the Re-Election Committee  
9 were handling those cases and that they did not see the common  
10 cause suit as any real problem before the election because  
11 they thought they could keep it tied up in discovery  
12 proceedings. I then told the President that the lawyers at  
13 the Re-Election Committee were very hopeful of slowing down  
14 the civil suit filed by the Democratic National Committee  
15 because they had been making ex parte contacts with the judge  
16 handling the case and the judge was very understanding and  
17 trying to accommodate their problems. The President was pleased  
18 to hear this and responded to the effect that "Well, that's  
19 helpful." I also recall explaining to the President about the  
20 suits that the Re-Election Committee lawyers had filed against  
21 the Democrats as part of their counter-offensive.

22 There was a brief discussion about the potential  
23 hearings before the Patman Committee. The President asked me  
24 what we were doing to deal with the hearings and I reported  
25 that Dick Cook, who had once worked on Patman's Committee



2232

staff, was working on the problem. The President indicated that Bill Timmons should stay on top of the hearings, that we did not need the hearings before the election.

The conversation then moved to the press coverage of the Watergate incident and how the press was really trying to make this into a major campaign issue. At one point in this conversation I recall the President telling me to keep a good list of the press people giving us trouble, because we will make life difficult for them after the election. The conversation then turned to the use of the Internal Revenue Service to attack our enemies. I recall telling the President that we had not made much use of this because the White House did not have the clout to have it done, that the Internal Revenue Service was a rather democratically-oriented bureaucracy and it would be very dangerous to try any such activities. The President seemed somewhat annoyed and said that the Democratic Administrations had used this tool well and after the election we would get people in these agencies who would be responsive to the White House requirements.

The conversation then turned to the President's post-election plans to replace people who were not on our team in all the agencies. It was at this point that Haldeman, I remember, started taking notes and he also told the President that he had been developing information on which people should stay and which should go after the election. I recall that

Sept.  
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1 several days after my meeting with the President, I was  
2 talking to Dan Kingsly, who was in charge of developing the  
3 list for Haldeman as to people who should be removed after  
4 the election. I told Kingsly that this matter had come up  
5 during my conversation with the President and he said he had  
6 wondered what had put new life into his project as he had  
7 received several calls from Higby about the status of his  
8 project within the last few days. The meeting ended with a  
9 conversation with the President about a book I was reading.

10 I left the meeting with the impression that the President  
11 was well aware of what had been going on regarding the success  
12 of keeping the White House out of the Watergate scandal and  
13 I also had expressed to him my concern that I was not confident  
14 that the cover-up could be maintained indefinitely.

15 I would next like to turn to the White House efforts to  
16 block the Patman Committee hearings. As early as mid-August,  
17 1972, the White House learned through the Congressional  
18 relations staff that an investigation was being conducted by  
19 the staff of the House Banking and Currency Committee,  
20 under the direction of Chairman Patman, into many aspects of  
21 the Watergate incident. The focus of the investigation at the  
22 outset was the funding of the Watergate incident, and other  
23 possible illegal funding that may have involved banking  
24 violations. The White House concern was two-fold: First, the  
25 hearings would have resulted in more adverse pre-election

what had already been reported to me by Haldeman, that he had told Senator Baker that he would not permit White House staff to appear before the Select Committee, rather he would only permit the taking of written interrogatories. He asked me if I agreed with this and I said that written interrogatories were something that could be handled whereas appearances might create serious problems. He told me he would never let Haldeman and Ehrlichman go to the Hill. He also told me that Senator Gurney would be very friendly to the White House and that it would not be necessary to contact him because the President said Senator Gurney would know what to do on his own. On the way out of his office he told me I had done an excellent job of dealing with this matter during the campaign; that it had been the only issue that McGovern had had and the Democrats had tried to make something out of it but to no avail. I told him as we were walking together out of the office that I had only managed to contain the matter during the campaign, but I was not sure it could be contained indefinitely. He then told me that we would have to fight back and he was confident that I could do the job. Feb. 28

The meeting on February 28th with the President.

I had received word before I arrived at my office that the President wanted to see me. He asked me if I had talked to the Attorney General regarding Senator Baker. I told him that the Attorney General was seeking to meet with both Senator

Feb.  
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1 Ervin and Senator Baker, but that a meeting date had not yet  
2 been firmed up. I told him that I knew it was the Attorney  
3 General's wish to turn over the FBI investigation and the  
4 President said that he did not think we should, but asked me  
5 what I thought of the idea. I told him that I did not think  
6 that there was much damaging information in the FBI investiga-  
7 tion, although there could be some bad public relations from  
8 it. He told me to think about this matter. He also said that  
9 he had read in the morning paper about the Vesco case and  
10 asked me what part, if any, his brother Ed had had in the  
11 matter. I told him what I knew of his brother's involvement,  
12 which was that he was an innocent agent in the contribution  
13 transaction. We then discussed the leak to Time magazine  
14 of the fact that the White House had placed wiretaps on  
15 newsmen and White House staff people. The President asked  
16 me if I knew how this had leaked. I told him that I did not;  
17 that I knew several people were aware of it, but I did not  
18 know any who had leaked it. He asked me who knew about it. I  
19 told him that Mr. Sullivan had told me that he thought that  
20 Director Hoover had told somebody about it shortly after it  
21 happened because Hoover was against it and that Sullivan said  
22 that he had heard that this information had gone to Governor  
23 Rockefeller and in turn had come back from Governor Rockefeller  
24 to Dr. Kissinger. We then talked about the executive privilege  
25 statement and the President expressed his desire to get the

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Feb.  
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1 statement out well in advance of the Watergate hearings so  
2 that it did not appear to be in response to the Watergate  
3 hearings. We also discussed Mr. Mollenhoff's interest in the  
4 Fitzgerald case, and he asked me to look into the matter for  
5 Mr. Mollenhoff. Before departing his office, he again raised  
6 the matter that I should report directly to him and not through  
7 Haldeman and Ehrlichman. I told him that I thought he should  
8 know that I was also involved the post-June 17th activities  
9 regarding Watergate. I briefly described to him why I thought  
10 I had legal problems, in that I had been a conduit for many  
11 of the decisions that were made and, therefore, could be  
12 involved in an obstruction of justice. He would not accept my  
13 analysis and did not want me to get into it in any detail other  
14 than what I had just related. He reassured me not to worry,  
15 that I had no legal problems. (I raised this on another  
16 occasion with the President, when Dick Moore was present.)

17 Meeting of March 1st:

18 The first meeting on this date and the afternoon meeting  
19 which occurred on March 1st, related to preparing the  
20 President for his forthcoming press conference. The President  
21 asked me a number of questions about the Gray nomination hearings  
22 and facts that had come out during those hearings. In particular  
23 I can recall him stating that there should be no problem with  
24 the fact that I had received the FBI reports. He said that I  
25 was conducting an investigation for him and that it would be

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1       The phone conversation of March 10th. The President  
2       called me to tell me that he felt we should get the  
3       Executive privilege statement out immediately; that this  
4       should be done before I was called before the Senate  
5       Judiciary Committee in connection with the Gray hearings so  
6       that it would not appear that the statement on Executive  
7       privilege was in response to the action by the Senate  
8       Committee.

Mar.  
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9       The meeting of March 13th. This was a rather lengthy  
10      meeting, the bulk of which was taken up by a discussion about  
11      the Gray hearings and the fact that the Senate Judiciary  
12      Committee had voted to invite me to appear in connection with  
13      Gray's nomination. It was at this time we discussed the  
14      potential of litigating the matter of Executive privilege and  
15      thereby preventing anybody from going before any Senate  
16      Committee until that matter was resolved. The President liked  
17      the idea very much, particularly when I mentioned to him that  
18      it might be possible that he could also claim attorney/client  
19      privilege on me so that the strongest potential case on  
20      Executive privilege would probably rest on the counsel to the  
21      President. I told him that obviously, this area would have  
22      to be researched. He told me that he did not want Haldeman  
23      and Ehrlichman to go before the Ervin hearings and that if we  
24      were litigating the matter on Dean, that no one would have to  
25      appear. Toward the end of the conversation, we got into a

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1 discussion of Watergate matters specifically. I told the  
2 President about the fact that there were money demands being  
3 made by the seven convicted defendants, and that the  
4 sentencing of these individuals was not far off. It was  
5 during this conversation that Haldeman came into the office.  
6 After this brief interruption by Haldeman's coming in, but  
7 while he was still there, I told the President about the fact  
8 that there was no money to pay these individuals to meet  
9 their demands. He asked me how much it would cost. I told  
10 him that I could only make an estimate that it might be as  
11 high as a million dollars or more. He told me that that  
12 was no problem, and he also looked over at Haldeman and  
13 repeated the same statement. He then asked me who was  
14 demanding this money and I told him it was principally coming  
15 from Hunt through his attorney. The President then referred  
16 to the fact that Hunt had been promised Executive clemency.  
17 He said that he had discussed this matter with Ehrlichman  
18 and contrary to instructions that Ehrlichman had given Colson  
19 not to talk to the President about it, that Colson had also  
20 discussed it with him later. He expressed some annoyance at  
21 the fact that Colson had also discussed this matter with him.

22 The conversation then turned back to a question from the  
23 President regarding the money that was being paid to the  
24 defendants. He asked me how this was done. I told him I  
25 didn't know much about it other than the fact that the money

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1 was laundered so it could not be traced and then there were  
2 secret deliveries. I told him I was learning about things I  
3 had never known before, but the next time I would certainly  
4 be more knowledgeable. This comment got a laugh out of  
5 Haldeman. The meeting ended on this note and there was no  
6 further discussion of the matter and it was left hanging just  
7 as I have described it.

8 The meetings on March 14th. The meetings which occurred  
9 on this day principally involved preparing the President  
10 for a forthcoming press conference. I recall talking about  
11 Executive privilege and making Dean a test case in the  
12 courts on Executive privilege. The President said that he  
13 would like very much to do this and if the opportunity came  
14 up in the press conference, he would probably so respond.  
15 I also recall that during the meetings which occurred on this  
16 day, that the President was going to try to find an answer  
17 that would get Ziegler off the hook of the frequent questions  
18 asked him regarding the Watergate. He said that he was going  
19 to say that he would take no further questions on the Water-  
20 gate until the completion of the Ervin hearings and that  
21 Ziegler in turn could repeat the same statement and avoid  
22 future interrogation by the press on the subject.

23 The meeting on March 15th. It was late in the afternoon  
24 after the President's press conference that he asked Dick Moore  
25 and I to come over to visit with him. He was in a very



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possible about the Watergate matter because I did not think that he fully realized all the facts and the implication of those facts for people at the White House as well as himself. He said that I should meet with him the next morning about 10 o'clock.

Before going in to tell the President some of these things, I decided I should call Haldeman because I knew that his name would come up in the matter. I called Haldeman and told him what I was going to do and Haldeman agreed that I should proceed to so inform the President of the situation.

Mar.  
21  
(morning)

The meeting of March 21st. As I have indicated, my purpose in requesting this meeting particularly with the President was that I felt it necessary that I give him a full report of all the facts that I knew and explain to him what I believed to be the implication of those facts. It was my particular concern with the fact that the President did not seem to understand the implications of what was going on. For example, when I had earlier told him that I thought I was involved in an obstruction of justice situation he had argued with me to the contrary after I had explained it to him. Also, when the matter of money demands had come up previously he had very nonchalantly told me that that was no problem and I did not know if he realized that he himself could be getting involved in an obstruction of justice by having promised clemency to Hunt. What I had hoped to do in this conversation

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1 was to have the President tell me that we had to end the  
2 matter -- now. Accordingly, I gave considerable thought to  
3 how I would present this situation to the President and try  
4 to make as dramatic a presentation as I could to tell him how  
5 serious I thought the situation was that the cover-up  
6 continue.

7 I began by telling the President that there was a cancer  
8 growing on the Presidency and that if the cancer was not removed  
9 that the President himself would be killed by it. I also told  
10 him that it was important that this cancer be removed  
11 immediately because it was growing more deadly every day.  
12 I then gave him what I told him would be a broad overview of  
13 the situation and I would come back and fill in the details  
14 and answer any questions he might have about the matter.

15 I proceeded to tell him how the matter had commenced in  
16 late January and early February but that I did not know how  
17 the plans had finally been approved. I told him I had  
18 informed Haldeman what was occurring, and Haldeman told me I  
19 should have nothing to do with it. I told him that I had  
20 learned that there had been pressure from Colson on Magruder  
21 but I did not have all the facts as to the degree of pressure.  
22 I told him I did not know if Mitchell had approved the  
23  
24  
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Mar.  
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1 plans but I had been told that Mitchell had been a recipient  
2 of the wiretap information and that Haldeman had also received  
3 some information through Strachan.

4 I then proceeded to tell him some of the highlights  
5 that had occurred during the cover up. I told him that  
6 Kalmbach had been used to raise funds to pay these seven  
7 individuals for their silence at the instructions of  
8 Ehrlichman, Haldeman, and Mitchell and I had been the con-  
9 veyor of this instruction to Kalmbach. I told him that after  
10 the decision had been made that Magruder was to remain at the  
11 Re-election Committee I had assisted Magruder in preparing his  
12 false story for presentation to the grand jury. I told him  
13 that cash that had been at the White House had been funneled  
14 back to the Re-election Committee for the purpose of paying  
15 the seven individuals to remain silent.

16 I then proceeded to tell him that perjury had been commit-  
17 ted, and for this cover up to continue it would require more  
18 perjury and more money. I told him that the demands of the  
19 convicted individuals were continually increasing and that  
20 with sentencing imminent, the demands had become specific.  
21 I told him that on Monday the 19th, I had received a  
22 message from one of the Re-election Committee lawyers  
23 who had spoken directly with Hunt and that Hunt had sent a  
24 message to me demanding money. I then explained to him the  
25 message that Hunt had told Paul O'Brien the preceding Friday.

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to be passed on to me. I told the President I'd asked O'Brien why to Dean and O'Brien had asked Hunt the same question. But Hunt had merely said you just pass this message on to Dean. The message was that Hunt wanted \$72,000 for living expenses and \$50,000 for attorneys fees and if he did not get the money and get it quickly that he would have a lot of seamy things to say about what he had done for John Ehrlichman while he was at the White House. If he did not receive the money, he would have to reconsider his options.

I informed the President that I had passed this message on to both Haldeman and Ehrlichman. Ehrlichman asked me if I had discussed the matter with Mitchell. I had told Ehrlichman that I had not done so and Ehrlichman asked me to do so. I told the President I had called Mitchell pursuant to Ehrlichman's request but I had no idea of what was happening with regard to the request.

I then told the President that this was just typical of the type of blackmail that the White House would continue to be subjected to and that I didn't know how to deal with it. I also told the President that I thought that I would as a result of my name coming out during the Gray hearings be called before the grand jury and that if I was called to testify before the grand jury or the Senate Committee I would have to tell the facts the way I know them. I said I did not know if executive privilege would be applicable to any appearance I

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Mar.  
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1 might have before the grand jury. I concluded by saying that  
2 it is going to take continued perjury and continued support  
3 of these individuals to perpetuate the cover-up and that I did  
4 not believe it was possible to do continue it; rather I  
5 thought it was time for surgery on the cancer itself and that  
6 all those involved must stand up and account for themselves  
7 and that the President himself get out in front of this matter.

8 I told the President that I did not believe that all  
9 of the seven defendants would maintain their silence forever,  
10 in fact, I thought that one or more would very likely break  
11 rank.

12 After I finished, I realized that I had not really  
13 made the President understand because after he asked a few  
14 questions, he suggested that it would be an excellent  
15 idea if I gave some sort of briefing to the Cabinet and that  
16 he was very impressed with my knowledge of the circumstances  
17 but he did not seem particularly concerned with their impli-  
18 cations.

19 It was after my presentation to the President and  
20 during our subsequent conversation the President called  
21 Haldeman into the office and the President suggested that we  
22 have a meeting with Mitchell, Haldeman and Ehrlichman to dis-  
23 cuss how to deal with this situation. What emerged from that  
24 discussion after Haldeman came into the office was that John  
25 Mitchell should account for himself for the pre-June 17th.

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1 activities and the President did not seem concerned about the  
2 activities which had occurred after June 17th.

3 After I departed the President's office I subsequently  
4 went to a meeting with Haldeman and Ehrlichman to discuss the  
5 matter further. The sum and substance of that discussion  
6 was that the way to handle this now was for Mitchell to step  
7 forward and if Mitchell were to step forward we might not be  
8 confronted with the activities of those involved in the White  
9 House in the cover-up.

10 Accordingly, Haldeman, as I recall, called Mitchell and  
11 asked him to come down the next day for a meeting with the  
12 President on the Watergate matter.

Mar.  
21  
(afternoon)

13 In the late afternoon of March 21st, Haldeman and  
14 Ehrlichman and I had a second meeting with the President. Be-  
15 fore entering this meeting I had a brief discussion in the  
16 President's outer office of the Executive Office Building  
17 suite with Haldeman in which I told him that we had to op-  
18 tions:

19 One is that this thing goes all the way and deals with  
20 both the pre-activities and the post-activities, or the  
21 second alternative; if the cover-up was to proceed we would  
22 have to draw the wagons in a circle around the White House and  
23 that the White House protect itself. I told Haldeman that it  
24 had been the White House's assistance to the re-election commit-  
tee that had gotten us into much of this problem and now the

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only hope would be to protect ourselves from further involvement.

The meeting with the President that afternoon with Haldeman, Ehrlichman and myself was a tremendous disappointment to me because it was quite clear that the cover-up as far as the White House was concerned was going to continue. I recall that while Haldeman, Ehrlichman and I were sitting at a small table in front of the President in his Executive Office Building office that I for the first time said in front of the President that I thought that Haldeman, Ehrlichman and Dean were all indictable for obstruction of Justice and that was the reason I disagreed with all that was being discussed at that point in time.

I could tell that both Haldeman, and particularly Ehrlichman, were very unhappy with my comments. I had let them very clearly know that I was not going to participate in the matter any further and that I thought it was time that everybody start thinking about telling the truth.

I again repeated to them I did not think it was possible to perpetuate the cover-up and the important thing now was to get the President out in front.

The meeting of March 22nd: the arrangements had been made to have a meeting after lunch with the President with Ehrlichman, Haldeman, Mitchell and myself. Mr. Mitchell came to Washington that morning for a meeting in Haldeman's

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(HALDEMAN)

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1 request and asked him to meet with Ehrlichman that day.  
2 I have turned over to the Committee a tape recording of this  
3 conversation. At the time we talked, Magruder had  
4 already decided to tell the full truth, and in fact, I  
5 believe, had done so in a meeting with the U.S. Attorneys.  
6 During the phone conversation, Magruder said that his testi-  
7 mony had not implicated me. He also said that one of the  
8 problems he was facing was that he had committed perjury when  
9 he testified before the Grand Jury and the trial. I responded  
10 that I did not know anything about that, and he replied that  
11 even if I didn't, he did. He did not contradict me, thus show-  
12 ing that, at that point in time at least, I did not know he  
13 had perjured himself.

Sept.  
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14 Turning to the September 15 meeting, I was in meetings  
15 with the President all afternoon on September 15, 1972. At  
16 the end of the afternoon, the President had John Dean come in.  
17 This was the day that the indictments had been brought down  
18 in the Watergate case, and the President knew John Dean had been  
19 concentrating for a three-month period on the investigation  
20 for the White House. I am sure therefore that the President  
21 thought it would be a good time to give Dean a pat on the  
22 back.

23 There was no mood of exuberance or excitement on the  
24 President's part at the time the indictments were brought down.  
25 He does not take joy from the misfortunes of other people, and



no 13

Sept.  
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1 I don't think he found it very pleasant that the people had  
2 been indicted. Naturally, however, it was good news as far as  
3 the White House and the Administration were concerned that  
4 when the indictments were brought down, after a thorough investi-  
5 gation, it had been established there was not any involvement  
6 by anyone in the White House. This confirmed what Mr. Dean  
7 had been telling us, and we had been reporting to the Presi-  
8 dent over the period of the past three months.

9 As was the case with all meetings in the Oval Office  
10 when the President was there, this meeting with Mr. Dean was  
11 recorded. At the President's request, I recently reviewed the  
12 recording of that meeting (at which I was present throughout)  
13 in order to report on its contents to the President. I should  
14 interject here that I also reviewed the recording of the March  
15 21st meeting of the President, Mr. Dean and myself for the  
16 same purpose, and I have made reports to the President on both  
17 of those meetings. I have not at any time listened to any other  
18 recordings of the meetings in the President's office or of the  
19 President's phone calls.

20 The President did not open the meeting of September 15th  
21 with the statement that "Bob has kept me posted on your  
22 handling of the Watergate" or anything even remotely resembling  
23 that. He said, "Hi, this was quite a day, you've got Water-  
24 gate on the way" or something to that effect. Dean responded  
25 that it had been quite a three months and then reported to the

HAB 1

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1 President on how the press was handling the indictments and,  
2 apparently, a Clark MacGregor press conference.

3 The discussion then covered the matter of the new bug  
4 that had brecently been discovered in the Democratic National  
5 Committee and the question of whether it had been planted  
6 by the DNC and the matter of Mr. Nixon's campaign being bugged  
7 in 1968 and some discussion of whether to try to get out evi-  
8 dence of that. There was some discussion about Judge Richey  
9 hearing the civil case and a comment that he would keep  
10 Roemer McPhee abreast of what was happening. I don't recall any  
11 comment about the judge trying to accommodate Dean's hopes of  
12 slowing down the suit, but there was some discussion about  
13 the problem of the civil case depositions interfering with the  
14 criminal prosecution -- apparently as a result of a conversa-  
15 tion between Judge Richey and Assistant U. S. Attorney Silbert.

16 Dean indicated that the indictments meant the end of the  
17 investigation by the Grand Jury and now there would be the  
18 GAO audit and some congressional inquiries, such as the  
19 Patman committee, but he assured the President that nothing  
20 would come out to surprise us. In other words, there was  
21 apparently no information that would be harmful that had not  
22 been uncovered already. The President did at that point command  
23 Dean for his handling of the whole Watergate matter, which was  
24 a perfectly natural thing for him to do. Dean reported that he  
25 was keeping a close eye on possible campaign law violations by

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3-15

the opposition; said there were some problems of bitterness at the Re-election Committee between the Finance Committee and Political Group; and said he was trying to keep notes on people who were emerging out of all this that were clearly not our friends.

There was, as Mr. Dean has indicated, quite a lengthy discussion of the Patman hearings and the various factors involved in that. There was some discussion of the reluctance of the IRS to follow-up on complaints of possible violations against people who were supporting our opponents because there are so many Democrats in the IRS bureaucracy that they won't take any action.

There was a discussion of cleaning house after the election, moving quickly to replace people at all levels of the Government. The meeting closed, as I recall, with a fairly long philosophical discussion.

I totally disagree with the conclusion that the President was aware of any type of cover-up and certainly Mr. Dean did not advise him of it at the September 15th meeting.

1 Mr. Haldeman. I will proceed then with the addendum on  
2 the March 21 meeting. I was present for the final 40 minutes  
3 of the President's meeting with John Dean on the morning of  
4 March 21. While I was not present for the first hour of the  
5 meeting, I did listen to the tape of the entire meeting.

6 Following is the substance of that meeting to the best  
7 of my recollection.

8 Dean reported some facts regarding the planning and  
9 the break-in of the DNC and said again there were no White  
10 House personnel involved. He felt Magruder was fully  
11 aware of the operation, but he was not sure about Mitchell. He  
12 said that Liddy had given him a full rundown right after Water-  
13 gate and that no one in the White House was involved. He  
14 said that his only concerns regarding the White House were in  
15 relation to the Colson phone call to Magruder which  
16 might indicate White House pressure and the possibility that  
17 Haldeman got some of the "fruits" of the bugging via Strachan  
18 since he had been told the "fruits" had been supplied to  
19 Strachan.

20 He outlined his role in the January planning meetings  
21 and recounted a report he said he made to me regarding the  
22 second of those meetings.

23 Regarding the post-June 17th situation, he indicated  
24 concern about two problems, money and clemency. He said that  
25 Colson had said something to Hunt about clemency. He did not

hush2

(morning)

6113

1 report any other offers of clemency although he said he felt  
2 the defendants expected it. The President confirmed that he  
3 could not offer clemency and Dean agreed.

4 Regarding money, Dean said he and Haldeman were in-  
5 volved. There was a bad appearance which could be developed  
6 into a circumstantial chain of evidence regarding obstruction  
7 of justice. He said that Kalmbach had raised money for the  
8 defendants; that Haldeman had okayed the return of the \$350,000  
9 to the Committee; and that Dean had handled the dealings be-  
10 tween the parties in doing this. He said that the money was  
11 for lawyers' fees.

12 He also reported on a current Hunt blackmail threat. He  
13 said Hunt was demanding \$120,000 or else he would tell about  
14 the seamy things he had done for Ehrlichman. The President  
15 pursued this in considerable detail, obviously trying to smoke  
16 out what was really going on. He led Dean on regarding the  
17 process and what he would recommend doing. He asked such things  
18 as -- "well, this is the thing you would recommend? we ought  
19 to do this? is that right?" and he asked where the money would  
20 come from? how it would be delivered? and so on. He asked how much  
21 money would be involved over the years and Dean said "probably  
22 a million dollars -- but the problem is that it is hard to  
23 raise." The President said "there is no problem in raising a  
24 million dollars, we can do that, but it would be wrong." I  
25 have the clear impression that he was trying to find out what

nash3

Mar. 21  
(morning)  
6114

1 it was Dean was saying and what Dean was recommending. He was  
2 trying to get Dean's view and he was asking him leading ques-  
3 tions in order to do that. This is the method the President  
4 ofetn used when he was moving toward a determination.

5 Dean also mentioned his concern about other activities  
6 getting out, such as the "Ellsberg" break-in, something re-  
7 garding Brookings, the other Hunt activities for Colson on  
8 Chappaquiddick, the Segretti matter, use of Kalmbach funds,  
9 etc.

10 When I entered the meeting, there was another dis-  
11 cussion regarding the Hunt threat and the President again  
12 explored in considerable depth the various options and tried  
13 to draw Dean out on his recommendation.

14 The meeting then turned to the question of how to deal  
15 with this situation and the President mentioned Ehrlichman's  
16 recommendation that everybody should go to the Grand Jury.  
17 The President told Dean to explore all of this with Haldeman,  
18 Ehrlichman and Mitchell.

19 There was no discussion while I was in the room (nor  
20 do I recall any discussion on the tape) on the question of  
21 clemency in the context of the President saying that he had  
22 discussed this with Ehrlichman and with Colson. The only  
23 mention of clemency was Dean's report that Colson had dis-  
24 cussed clemency with Hunt and the President's statement that  
25 he could not offer clemency and Dean's agreement -- plus a

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1 a comment that Dean thought the others expected it.

2 Dean mentioned several times during this meeting his aware-  
3 ness that he was telling the President things the President had  
4 known nothing about.

5 I have to surmise that there is a genuine confusion in  
6 Mr. Dean's mind as to what happened on March 13th versus what  
7 happened on March 21st, because some of what he describes  
8 in quite vivid detail as happening on March 13th did, in fact,  
9 happen on March 21st. The point about my laughing at his being  
10 more knowledgeable next time, and the question that he says  
11 he raised on March 13th regarding the million dollars are so  
12 accurately described, up to a point, as to what really happened  
13 on March 21st that I believe he is confused between the two  
14 dates.

15 Mr. Dean's recollection that the President had told him  
16 on March 13 that Ehrlichman had discussed an offer of clemency  
17 to Hunt with him and he had also discussed Hunt's clemency  
18 with Colson is at total variance with everything that I have  
19 ever heard from the President, Ehrlichman or Colson. I don't  
20 recall such a discussion in either the March 13 or the March  
21 21 meeting.

22 Now, to the question of impression. Mr. Dean drew  
23 the erroneous conclusion that the President was fully knowledge-  
24 able of the cover-up at the time of the March 13th meeting in  
25 the sense (1) of being aware that money had been paid for

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MAY 1964  
(MORNING)

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1 silence and that (2) the money demands could reach a million  
2 dollars and that the President said that was no problem. He  
3 drew his conclusion from a hypothetical discussion of ques-  
4 tions since the President told me later that he had no intention  
5 to do anything whatever about money and had no knowledge of  
6 the so-called cover-up.

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1 to the Committee?

2 Mr. Dash. Reproduced now.

3 Senator Baker. Thank you very much.

4 Senator ERVIN. You may proceed with your original state-  
5 ment.

Mar. 21  
(afternoon)

6 Mr. Naldeman. Thank you, sir.

7 Mr. Dean, Mr. Ehrlichman and I met with the President  
8 later that afternoon of the 21st. That meeting dealt with  
9 the questions of the grand jury, the Senate Committee and  
10 executive privilege in connection with gathering the facts  
11 and getting them out. I think there was some discussion of  
12 Ehrlichman's theory that everybody should go to the grand jury;  
13 and Dean's reaction that that would be fine as long as we had  
14 immunity. Mr. Ehrlichman, as I recall, very strongly shot  
15 down that thought from Dean saying it did not make any sense  
16 at all. Dean has testified that he argued that the way to get  
17 the truth out would be to send everybody to the grand jury with  
18 immunity. That, in itself, is rather indicative of the different  
19 attitudes. Mr. Ehrlichman was arguing for going to the grand  
20 jury without immunity in order to get the truth out. Mr. Dean  
21 was arguing for going to the grand jury with immunity to get  
22 the truth out.

23 I recall an incident after that afternoon meeting that Mr.  
24 Dean also recalls, but he says it took place before and he  
25 sees it a little bit differently. I remember that Dean and

SENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES, ET. AL:

Plaintiffs

**V.**

Civil  
Action  
No. \_\_\_\_\_

RICHARD M. NIXON, )  
INDIVIDUALLY AND AS PRESIDENT OF THE UNITED STATES)

THE WHITE HOUSE  
WASHINGTON, D.C.

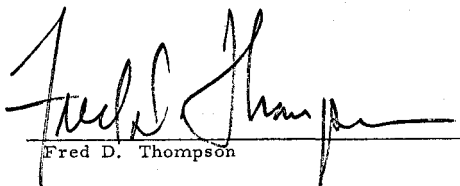
Defendant

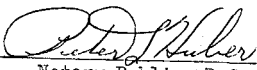
Fred D. Thompson, being sworn, deposes and says:

1. Early in June, 1973, the White House transmitted to the Select Committee a memorandum (which is attached to this affidavit) listing certain oral communications, both face-to-face and telephonic, between President Richard M. Nixon and John Wesley Dean III. This memorandum, inter alia, includes the exact times and durations of these communications, and, in the case of face-to-face communications, the other participants, if any, in those conversations.

2. Shortly thereafter, I received a telephone call from J. Fred Buzhardt, Special Counsel to the President. During this telephone call, Mr. Buzhardt related to me his understanding as to the substance of certain portions of the enumerated conversations between the President and Mr. Dean.

3. During my discussion with Mr. Buzhardt, I made detailed notes on the information that he gave me. Upon conclusion of the conversation, I promptly prepared a "Memorandum of Substance of Dean's Calls and Meeting with the President," a copy of which is attached to this affidavit. It is my belief that this memorandum accurately reflects the information imparted to me by Mr. Buzhardt.

  
Fred D. Thompson

Subscribed and sworn to, before  
me, this 9<sup>TH</sup> day of August, 1973  
  
Notary Public, D.C.  
My Commission Expires 14 May, 1978

MEETINGS AND TELEPHONE CONVERSATIONS BETWEEN  
THE PRESIDENT AND JOHN W. DEAN, III

No contact between the President and John W. Dean, III, during January, February, and March 1972

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April 13, 1972

PM 4:31 4:34 President met with Frank DeMarco, Jr., and  
 John Dean to sign 1971 income tax returns.

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May 1, 1972

PM 3:02 3:07 President had photo opportunity in Rose Garden for  
 National Secretaries Week. Mr. Dean attended

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No contact between the President and John W. Dean, III, during June and July 1972.

---

August 14, 1972

PM		The President met to sign personal legal documents with:
12:45	1:11	The First Lady
12:49	1:09	John J. Ratchford
12:49	1:11	Mr. Butterfield
12:49	1:11	Mr. Haldeman
12:49	1:12	Mr. Ehrlichman
12:49	1:12	John W. Dean, III
12:49	1:12	John H. Alexander
12:49	1:12	Richard S. Ritzel

No other contact during August 1972

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September 15, 1972

PM                      The President met with:

3:15 6:17	Mr. Haldeman
5:27 6:17	Mr. Dean

(The President talked with Mr. MacGregor by  
phone from 5:36 to 5:38)

No other contact during September 1972

---

October 9, 1972

PM 3:10 3:34	The President met with Samuel Newhouse, President of Newhouse Newspapers and Newhouse Broadcasting and Herb Klein.
3:23 3:34	John Dean joined the meeting.

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November 8, 1972

The President attended a senior staff meeting in the  
Roosevelt Room. Mr. John Dean was in  
attendance.

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November 12, 1972

8:40 8:44	The President met aboard "Spirit of '76" with Rose Mary Woods and Mr. and Mrs. John Dean
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No contact between the President and John W. Dean, III, during November  
and December 1972.

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January 21, 1973

AM 11:05 12:04 President and First Lady hosted Worship Service.  
John Dean attended.

---

February 27, 1973

PM 3:55 4:20 President met with John Dean alone in Oval Office.

---

February 28, 1973

AM 9:12 10:23 President met with John Dean in Oval Office.

---

March 1, 1973

AM 9:18 9:46 President met with his Counsel, John W. Dean, III,  
in the Oval Office.

10:36 10:44 President met with Mr. Dean in the Oval Office.

PM 1:06 1:14 President met with Mr. Dean in the Oval Office

---

March 6, 1973

AM 11:49 12:00 President met with Mr. Dean in the Oval Office.

---

March 7, 1973

AM 8:53 9:16 President met with Mr. Dean in the Oval Office.

---

March 8, 1973

AM 9:51 9:54 President met with Mr. Dean in the Oval Office.

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March 10, 1973

AM 9:20 9:44 President talked long distance with Mr. Dean.  
President initiated the call from Camp David  
to Mr. Dean who was in Washington, D. C.

---

March 13, 1973

PM 12:42 2:00 President met with Mr. Dean in the Oval Office.  
(Mr. Haldeman was present from 12:43-12:55)

---

March 14, 1973

AM 8:36 President telephoned Mr. Dean. The call was not  
completed.  
8:55 8:59 Mr. Dean returned the call and talked with the President.  
9:43 10:50 President met with Mr. Dean in the P's EOB Office.  
Also present were:  
Mr. Kissinger (departed at 9:50)  
Ronald L. Ziegler  
Richard A. Moore (9:55-10:50)

PM 12:27 12:28 President telephoned Mr. Dean.  
12:47 1:30 President met with Mr. Moore and Mr. Dean.  
4:25 4:26 President talked with Mr. Dean. (The President  
initiated the call.)  
4:34 4:36 President talked with Mr. Dean. (Mr. Dean  
initiated the call.)

---

March 15, 1973

PM 4:36 6:24 President met with Mr. Dean and Mr. Moore  
in the Oval Office.

---

March 16, 1973

AM 10:34 11:06 President met with Mr. Dean in the Oval Office.  
Mr. Ziegler was present from 10:58-11:10.

PM 8:14 8:23 President talked with Mr. Dean. (The President  
initiated the call.)

---

March 17, 1973

PM 1:25 2:10 President met with Mr. Dean in the Oval Office.

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March 19, 1973

PM 4:59 President requested that Mr. Moore and Mr. Dean  
join him in his EOB Office.

5:03 5:41 President met with Mr. Moore and Mr. Dean in  
his EOB Office.

---

March 20, 1973

AM 10:46 10:47 President talked with Mr. Dean. (The President  
initiated the call.)

PM 12:59 1:00 President talked with Mr. Dean. (The President  
initiated the call.)

1:42 2:31 President met with Mr. Dean and Mr. Moore.

7:29 7:43 President talked with Mr. Dean. (The President  
initiated the call.)



April 16, 1973

AM 10:00 10:40 President met with Mr. Dean in Oval Office.

PM 4:07 4:35 President met with Mr. Dean in the President's  
EOB Office.

4:04 4:05 President talked with Mr. Dean. (The President  
initiated the call.)

---

April 17, 1973

AM 9:19 9:25 President talked with Mr. Dean. (The President  
initiated the call.)

---

April 22, 1973

AM 8:24 8:39 President phoned Mr. Dean from Key Biscayne.

March 21, 1973

AM 10:12 11:55 President met with Mr. Dean in the Oval Office.  
Mr. Haldeman was also present for at least  
part of the time

PM 5:20 6:01 President met with Mr. Dean in the President's  
EOB office. Also present were:  
Mr. Ziegler (departed at 5:25)  
Mr. Haldeman  
Mr. Ehrlichman (5:25 - 6:01)

---

March 22, 1973

PM 1:57 3:43 President met with Mr. Dean in the President's  
EOB Office. Also present were:  
Mr. Ehrlichman (2:00-3:40)  
Mr. Haldeman (2:01-3:40)  
Mr. Mitchell (2:01-3:43)

---

March 23, 1973

PM 12:44 1:02 President talked long distance with Mr. Dean.  
(The President initiated the call from  
Florida to Mr. Dean who was in Washington  
D. C.)

3:28 3:44 President talked long distance with Mr. Dean  
(The President initiated the call from  
Florida to Mr. Dean who was in Camp  
David, Md.)

---

No contact during the period April 1-14

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April 15, 1973

P.M. 9:17 10:12 President met with Mr. Dean in the President's  
EOB Office.

MEMORANDUM OF SUBSTANCE OF DEAN'S CALLS  
AND MEETINGS WITH THE PRESIDENT

September 15, 1972	Dean reported on IRS investigation of Larry O'Brien. Dean reported on Watergate indictments.
February 27, 1973	Discussed executive privilege, minority counsel for Watergate Committee. Dean suggested White House aides submit answers to interrogatories.
February 28, 1973	President inquired of Watergate, Dean said no White House involvement, Stans was victim of circumstances, Colson was lightning rod because of his reputation. Discussed wiretappings which had been brought up in the Gray hearings. Sullivan, Deputy Director, was friend of Dean and Dean suggested they make sure that wiretaps of prior years (other Administrations) be made known.
March 1, 1973	Preparation for press conference -- go over question and answer book. Was decided the question would come up as to why Dean was sitting in on FBI interviews and that the reason was he was conducting an investigation for the President. President asked Dean to write a report. Dean was also critical of Gray.
	(March 2 press conference)
March 6, 1973	Discussed executive privilege guidelines, decided to cover former White House personnel as well as present.
March 7, 1973	Again discussion executive privilege guidelines. Dean again told the President the White House was clear. The President inquired as to how Pat Gray was doing. Dean informed him E.B. Williams had dropped out of the civil case.

March 8, 1973

President inquired as to whether Chapin had helped Segretti. Dean said no.

March 10, 1973

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(March 12: Issued statement on executive privilege, applies to present and former staffers but will provide information.)

March 13, 1973

Preparation for press conference. Went over questions and answers. President inquired as to Ken Rietz. Dean said no illegality involved. President asked if Colson or Haldeman knew Segretti. President asked if Mitchell and Colson knew of Watergate. Dean said there was nothing specific on Colson; that he didn't know about Mitchell but that Strachan could be involved. President states again that Dean should compile a written report about the matter. Dean said Sirica was a hanging judge, the President said he liked hanging judges. They discussed fund raising before April 7. Dean said that everything that had been done was legal.

March 14, 1973

Press conference was discussed -- questions and answers. Discussed executive privilege. Decided they needed a Supreme Court test. Decided that the President should discuss his 1948 position. That afternoon the President suggested Dean should possibly appear before the press and discussed whether Chapin should make a statement about Segretti. The Gray hearings and the use of FBI files were also discussed.

March 15, 1973

President held press conference. That afternoon discussed that day's press conference and decided on use of "separation of powers" instead of executive privilege terminology.

March 16, 1973

The President reiterated his position on use of raw FBI files. Suggested Dean's written report be accompanied by affidavits. Dean suggested untimely release of written report might prejudice rights of innocent people. Discussed possibility of getting

Dana to interview Haldeman and Ehrlichman. The President suggested Dean should possibly go to Camp David to write his report. ✓

March 17, 1973

President had made a note on a press survey containing an article alleging White House involvement for follow-up (Dean possibly has copy of this). Dean again suggested they bring out 1968 bugging and President said Kleindienst had advised against it. Several names were discussed as possibly subject to attack: Colson, Haldeman, Ehrlichman, Mitchell and Dean himself. The President asked Dean point-blank if he knew about the planned break-in in advance. Dean said no, there was no actual White House involvement regardless of appearances except possibly Strachan. Dean told President Magruder pushed Liddy hard but that Haldeman was not involved. The President wanted Haldeman, Ehrlichman and Dean to talk to the Committee and Dean resisted. Dean told the President of the Ellsberg break-in but that it had nothing to do with Watergate. ))

(March 19: Ervin had been on Face the Nation and accused Dean of hiding behind executive privilege.)

March 19, 1973

It was decided Dean would send a letter or sworn statement to the Judiciary Committee answering certain questions.

March 20, 1973

(Republican leadership had been in that day.) Dean discussed Mitchell's problems with the grand jury, Vesco and the Gurney press conference. The President and Moore agreed that the whole investigation should be made public and that a statement should be released immediately after the sentencing of the defendants. Dean suggested that each member of the Ervin Committee be challenged to invite an FBI investigation of his own Senate campaign. The President called Dean that night and Dean said that there was "not a scintilla of evidence" to indicate White House involvement and Dean suggested he give the President a more in-depth briefing on what had transpired.

March 21, 1973

Dean gave the President his theory of what had happened. He still said no prior June 17 White House knowledge, that Magruder probably knew, that Mitchell possibly knew, that Strachan probably knew, that Haldeman had possibly seen the fruits of the wiretaps through Strachan, that Ehrlichman was vulnerable because of his approval of Kalmbach's fund raising efforts. Colson had made the call to Magruder. He stated Hunt was trying to blackmail Ehrlichman about Hunt's prior plumber activities unless he was paid what ultimately might amount to \$1 million. The President said how could it possibly be paid, "What makes you think he would be satisfied with that?", stated it was blackmail, that it was wrong, that it would not work, that the truth would come out anyway. Dean had said that a Cuban group could possibly be used to transfer the payments. Dean said Colson had talked to Hunt about executive clemency. He spoke of Haldeman's return of the \$350,000. He said that Haldeman and Ehrlichman possibly had no legal guilt with regard to the money matters. Dean said nothing of his role with regard to the cover-up money. He said nothing about his discussions with Magruder helping him prepare for the grand jury. He said nothing of his instructions to Caulfield to offer executive clemency.

This information was gone over twice, the last time in Haldeman's presence.

Later that afternoon it was tentatively decided that everyone would go to the grand jury, however, Dean wanted immunity. Haldeman suggested that they write the whole thing out and release it from the White House. Ehrlichman said there should be no executive privilege claim and that no one should ask for immunity. The President told them to discuss these matters with Mitchell.

March 22, 1973

Mitchell suggests they go before the Ervin Committee, that they not use executive privilege but that first it should all be put down on paper .

March 23, 1973

The President called Dean and told him to go to Camp David. Later that afternoon he called Dean at Camp David to check on his progress.

(March 30: After it became obvious Dean would write no report, the President directed Ehrlichman to investigate.)

On April 14 Ehrlichman reported possible Mitchell, Magruder and Dean involvement. The President called Kleindienst, who followed up. (Up until now the President had assumed Dean was getting much of his information from the Justice Department.) Kleindienst and Petersen focused in on possible involvement of Haldeman, Ehrlichman and Strachan.

On April 15 Petersen submitted a memo on Ehrlichman, Haldeman and Strachan. They also found out about Gray's destruction of documents.)

April 15, 1973

Dean along with almost everybody else was called in that day. The President told Dean that he must go before the grand jury without immunity.

April 16, 1973

The President asks Dean to resign. Had two drafts prepared for Dean's signature. Dean demanded Haldeman and Ehrlichman resign also.

(Petersen asked the President to hold off on firing Dean until they could get him before the grand jury.)

On April 17 the President released his statement saying that no White House staffers would receive immunity.

On April 19 Dean said he would not be a scapegoat.

On April 27 Petersen told the President there is no use trying to get Dean to go before the grand jury, that he was demanding immunity.

On April 30 the President made his speech concerning Haldeman's and Ehrlichman's resignations and Dean's firing.)

Exhibit J

FOR IMMEDIATE RELEASE

MAY 22, 1973

Office of the White House Press Secretary

THE WHITE HOUSE

## STATEMENT BY THE PRESIDENT

Allegations surrounding the Watergate affair have so escalated that I feel a further statement from the President is required at this time.

A climate of sensationalism has developed in which even second-or third-hand hearsay charges are headlined as fact and repeated as fact.

Important national security operations which themselves had no connection with Watergate have become entangled in the case.

As a result, some national security information has already been made public through court orders, through the subpoenaing of documents and through testimony witnesses have given in judicial and Congressional proceedings. Other sensitive documents are now threatened with disclosure. Continued silence about those operations would compromise rather than protect them, and would also serve to perpetuate a grossly distorted view -- which recent partial disclosures have given -- of the nature and purpose of those operations.

The purpose of this statement is threefold:

-- First, to set forth the facts about my own relationship to the Watergate matter.

-- Second, to place in some perspective some of the more sensational -- and inaccurate -- of the charges that have filled the headlines in recent days, and also some of the matters that are currently being discussed in Senate testimony and elsewhere.

-- Third, to draw the distinction between national security operations and the Watergate case. To put the other matters in perspective, it will be necessary to describe the national security operations first.

In citing these national security matters, it is not my intention to place a national security "cover" on Watergate, but rather to separate them out from Watergate -- and at the same time to explain the context in which certain actions took place that were later misconstrued or misused.

Long before the Watergate break-in, three important national security operations took place which have subsequently become entangled in the Watergate case.

-- The first operation, begun in 1969, was a program of wiretaps. All were legal, under the authorities then existing. They were undertaken to find and stop serious national security leaks.

-- The second operation was a reassessment, which I ordered in 1970, of the adequacy of internal security measures. This resulted in a plan and a directive to strengthen our intelligence operations. They were protested by Mr. Hoover, and as a result of his protest they were not put into effect.

-- The third operation was the establishment, in 1971, of a Special Investigations Unit in the White House. Its primary mission was to plug leaks of vital security information. I also directed this group to prepare an accurate history of certain crucial national security matters which occurred under prior Administrations, on which the Government's records were incomplete.

Here is the background of these three security operations initiated in my Administration.

(MORE)



-2-

1969 Wiretaps

By mid-1969, my Administration had begun a number of highly sensitive foreign policy initiatives. They were aimed at ending the war in Vietnam, achieving a settlement in the Middle East, limiting nuclear arms, and establishing new relationships among the great powers. These involved highly secret diplomacy. They were closely interrelated. Leaks of secret information about any one could endanger all.

Exactly that happened. News accounts appeared in 1969, which were obviously based on leaks -- some of them extensive and detailed -- by people having access to the most highly classified security materials.

There was no way to carry forward these diplomatic initiatives unless further leaks could be prevented. This required finding the source of the leaks.

In order to do this, a special program of wiretaps was instituted in mid-1969 and terminated in February, 1971. Fewer than 20 taps, of varying duration, were involved. They produced important leads that made it possible to tighten the security of highly sensitive materials. I authorized this entire program. Each individual tap was undertaken in accordance with procedures legal at the time and in accord with long-standing precedent.

The persons who were subject to these wiretaps were determined through coordination among the Director of the FBI, my Assistant for National Security Affairs, and the Attorney General. Those wiretapped were selected on the basis of access to the information leaked, material in security files, and evidence that developed as the inquiry proceeded.

Information thus obtained was made available to senior officials responsible for national security matters in order to curtail further leaks.

The 1970 Intelligence Plan

In the spring and summer of 1970, another security problem reached critical proportions. In March a wave of bombings and explosions struck college campuses and cities. There were 400 bomb threats in one 24-hour period in New York City. Rioting and violence on college campuses reached a new peak after the Cambodian operation and the tragedies at Kent State and Jackson State. The 1969-70 school year brought nearly 1800 campus demonstrations, and nearly 250 cases of arson on campus. Many colleges closed. Gun battles between guerrilla-style groups and police were taking place. Some of the disruptive activities were receiving foreign support.

Complicating the task of maintaining security was the fact that, in 1966, certain types of undercover FBI operations that had been conducted for many years had been suspended. This also had substantially impaired our ability to collect foreign intelligence information. At the same time, the relationships between the FBI and other intelligence agencies had been deteriorating. By May, 1970, FBI Director Hoover shut off his agency's liaison with the CIA altogether.

On June 5, 1970, I met with the Director of the FBI (Mr. Hoover), the Director of the Central Intelligence Agency (Mr. Richard Helms), the Director of the Defense Intelligence Agency (General Donald V. Bonnett) and the Director of the National Security Agency (Admiral Noel Gayler). We discussed the urgent need for better intelligence operations. I appointed Director Hoover as chairman of an interagency committee to prepare recommendations.

(MORRIS)

- 3 -

On June 25, the committee submitted a report which included specific options for expanded intelligence operations, and on July 23 the agencies were notified by memorandum of the options approved. After reconsideration, however, prompted by the opposition of Director Hoover, the agencies were notified five days later, on July 28, that the approval had been rescinded. The options initially approved had included resumption of certain intelligence operations which had been suspended in 1966. These in turn had included authorization for surreptitious entry -- breaking and entering, in effect -- on specified categories of targets in specified situations related to national security.

Because the approval was withdrawn before it had been implemented, the net result was that the plan for expanded intelligence activities never went into effect.

The documents spelling his 1970 plan are extremely sensitive. They include -- and are based upon -- assessments of certain foreign intelligence capabilities and procedures, which of course must remain secret. It was this unused plan and related documents that John Dean removed from the White House and placed in a safe deposit box, giving the keys to Judge Sirica. The same plan, still unused, is being headlined today.

Coordination among our intelligence agencies continued to fall short of our national security needs. In July, 1970, having earlier discontinued the FBI's liaison with the CIA, Director Hoover ended the FBI's normal liaison with all other agencies except the White House. To help remedy this, an Intelligence Evaluation Committee was created in December, 1970. Its members included representatives of the White House, CIA, FBI, NSA, the Departments of Justice, Treasury, and Defense, and the Secret Service.

The Intelligence Evaluation Committee and its staff were instructed to improve coordination among the intelligence community and to prepare evaluations and estimates of domestic intelligence. I understand that its activities are now under investigation. I did not authorize nor do I have any knowledge of any illegal activity by this Committee. If it went beyond its charter and did engage in any illegal activities, it was totally without my knowledge or authority.

#### The Special Investigations Unit

On Sunday, June 13, 1971, The New York Times published the first installment of what came to be known as "The Pentagon Papers." Not until a few hours before publication did any responsible Government official know that they had been stolen. Most officials did not know they existed. No senior official of the Government had read them or knew with certainty what they contained.

All the Government knew, at first, was that the papers comprised 47 volumes and some 7,000 pages, which had been taken from the most sensitive files of the Departments of State and Defense and the CIA, covering military and diplomatic moves in a war that was still going on.

Moreover, a majority of the documents published with the first three installments in The Times had not been included in the 47-volume study -- raising serious questions about what and how much else might have been taken.

There was every reason to believe this was a security leak of unprecedented proportions.

(MORE)

-4-

It created a situation in which the ability of the Government to carry on foreign relations even in the best of circumstances could have been severely compromised. Other governments no longer knew whether they could deal with the United States in confidence. Against the background of the delicate negotiations the United States was then involved in on a number of fronts -- with regard to Vietnam, China, the Middle East, nuclear arms limitations, U. S. - Soviet relations, and others -- in which the utmost degree of confidentiality was vital, it posed a threat so grave as to require extraordinary actions.

Therefore during the week following the Pentagon Papers publication, I approved the creation of a Special Investigations Unit within the White House -- which later came to be known as the "plumbers." This was a small group at the White House whose principal purpose was to stop security leaks and to investigate other sensitive security matters. I looked to John Ehrlichman for the supervision of this group.

Egil Krogh, Mr. Ehrlichman's assistant, was put in charge. David Young was added to this unit, as were E. Howard Hunt and G. Gordon Liddy.

The unit operated under extremely tight security rules. Its existence and functions were known only to a very few persons at the White House. These included Messrs. Haldeman, Ehrlichman and Dean.

At about the time the unit was created, Daniel Ellsberg was identified as the person who had given the Pentagon Papers to The New York Times. I told Mr. Krogh that as a matter of first priority, the unit should find out all it could about Mr. Ellsberg's associates and his motives. Because of the extreme gravity of the situation, and not then knowing what additional national secrets Mr. Ellsberg might disclose, I did impress upon Mr. Krogh the vital importance to the national security of his assignment. I did not authorize and had no knowledge of any illegal means to be used to achieve this goal.

However, because of the emphasis I put on the crucial importance of protecting the national security, I can understand how highly motivated individuals could have felt justified in engaging in specific activities that I would have disapproved had they been brought to my attention.

Consequently, as President, I must and do assume responsibility for such actions despite the fact that I, at no time approved or had knowledge of them.

I also assigned the unit a number of other investigatory matters, dealing in part with compiling an accurate record of events related to the Vietnam War, on which the Government's records were inadequate (many previous records having been removed with the change of Administrations) and which bore directly on the negotiations then in progress. Additional assignments included tracing down other national security leaks, including one that seriously compromised the U. S. negotiating position in the SALT talks.

The work of the unit tapered off around the end of 1971. The nature of its work was such that it involved matters that, from a national security standpoint, were highly sensitive then and remain so today.

MORE

- 5 -

These intelligence activities had no connection with the break-in of the Democratic headquarters, or the aftermath.

I considered it my responsibility to see that the Watergate investigation did not impinge adversely upon the national security area. For example, on April 18th, 1973, when I learned that Mr. Hunt, a former member of the Special Investigations Unit at the White House, was to be questioned by the U. S. Attorney, I directed Assistant Attorney General Petersen to pursue every issue involving Watergate but to confine his investigation to Watergate and related matters and to stay out of national security matters. Subsequently, on April 25, 1973, Attorney General Kleindienst informed me that because the Government had clear evidence that Mr. Hunt was involved in the break-in of the office of the psychiatrist who had treated Mr. Ellsberg, he, the Attorney General, believed that despite the fact that no evidence had been obtained from Hunt's acts, a report should nevertheless be made to the court trying the Ellsberg case. I concurred, and directed that the information be transmitted to Judge Byrne immediately.

#### Watergate

The burglary and bugging of the Democratic National Committee headquarters came as a complete surprise to me. I had no inkling that any such illegal activities had been planned by persons associated with my campaign; if I had known, I would not have permitted it. My immediate reaction was that those guilty should be brought to justice and, with the five burglars themselves already in custody, I assumed that they would be.

Within a few days, however, I was advised that there was a possibility of CIA involvement in some way.

It did seem to me possible that, because of the involvement of former CIA personnel, and because of some of their apparent associations, the investigation could lead to the uncovering of covert CIA operations totally unrelated to the Watergate break-in.

In addition, by this time, the name of Mr. Hunt had surfaced in connection with Watergate, and I was alerted to the fact that he had previously been a member of the Special Investigations Unit in the White House. Therefore, I was also concerned that the Watergate investigation might well lead to an inquiry into the activities of the Special Investigations Unit itself.

In this area, I felt it was important to avoid disclosure of the details of the national security matters with which the group was concerned. I knew that once the existence of the group became known, it would lead inexorably to a discussion of these matters, some of which remain, even today, highly sensitive.

I wanted justice done with regard to Watergate; but in the scale of national priorities with which I had to deal -- and not at that time having any idea of the extent of political abuse which Watergate reflected -- I also had to be deeply concerned with ensuring that neither the covert operations of the CIA nor the operations of the Special Investigations Unit should be compromised. Therefore, I instructed Mr. Haldeman and Mr. Ehrlichman to ensure that the investigation of the break-in not expose either an unrelated covert operation of the CIA or the activities of the White House investigations unit -- and to see that this was personally coordinated between General Walters, the Deputy Director of the CIA, and Mr. Gray of the FBI. It was certainly not my intent, nor my wish, that the investigation of the Watergate break-in or of related acts be impeded in any way.

(MORE)

-6-

On July 6, 1972, I telephoned the Acting Director of the FBI, L. Patrick Gray, to congratulate him on his successful handling of the hijacking of a Pacific Southwest Airlines plane the previous day. During the conversation Mr. Gray discussed with me the progress of the Watergate investigation, and I asked him whether he had talked with General Walters. Mr. Gray said that he had, and that General Walters had assured him that the CIA was not involved. In the discussion, Mr. Gray suggested that the matter of Watergate might lead higher. I told him to press ahead with his investigation.

It now seems that later, through whatever complex of individual motives and possible misunderstandings, there were apparently wide-ranging efforts to limit the investigation or to conceal the possible involvement of members of the Administration and the campaign committee.

I was not aware of any such efforts at the time. Neither, until after I began my own investigation, was I aware of any fund raising for defendants convicted of the break-in at Democratic headquarters, much less authorize any such fund raising. Nor did I authorize any offer of Executive clemency for any of the defendants.

In the weeks and months that followed Watergate, I asked for, and received, repeated assurances that Mr. Dean's own investigation (which included reviewing files and sitting in on FBI interviews with White House personnel) had cleared everyone then employed by the White House of involvement.

In summary, then:

(1) I had no prior knowledge of the Watergate bugging operation, or of any illegal surveillance activities for political purposes.

(2) Long prior to the 1972 campaign, I did set in motion certain internal security measures, including legal wiretaps, which I felt were necessary from a national security standpoint and, in the climate then prevailing, also necessary from a domestic security standpoint.

(3) People who had been involved in the national security operations later, without my knowledge or approval, undertook illegal activities in the political campaign of 1972.

(4) Elements of the early post-Watergate reports led me to suspect, incorrectly, that the CIA had been in some way involved. They also led me to surmise, correctly, that since persons originally recruited for covert national security activities had participated in Watergate, an unrestricted investigation of Watergate might lead to and expose those covert national security operations.

(5) I sought to prevent the exposure of these covert national security activities, while encouraging those conducting the investigation to pursue their inquiry into the Watergate itself. I so instructed my staff, the Attorney General and the Acting Director of the FBI.

(6) I also specifically instructed Mr. Haldeman and Mr. Ehrlichman to ensure that the FBI would not carry its investigation into areas that might compromise these covert national security activities, or those of the CIA.

(7) At no time did I authorize or know about any offer of Executive clemency for the Watergate defendants. Neither did I know until the time of my own investigation, of any efforts to provide them with funds.

(MORE)

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Conclusion

With hindsight, it is apparent that I should have given more heed to the warning signals I received along the way about a Watergate cover-up and less to the reassurances.

With hindsight, several other things also become clear:

-- With respect to campaign practices, and also with respect to campaign finances, it should now be obvious that no campaign in history has ever been subjected to the kind of intensive and searching inquiry that has been focused on the campaign waged in my behalf in 1972.

It is clear that unethical, as well as illegal, activities took place in the course of that campaign.

None of these took place with my specific approval or knowledge. To the extent that I may in any way have contributed to the climate in which they took place, I did not intend to; to the extent that I failed to prevent them, I should have been more vigilant.

It was to help ensure against any repetition of this in the future that last week I proposed the establishment of a top-level, bipartisan, independent commission to recommend a comprehensive reform of campaign laws and practices. Given the priority I believe it deserves, such reform should be possible before the next Congressional elections in 1974.

-- It now appears that there were persons who may have gone beyond my directives, and sought to expand on my efforts to protect the national security operations in order to cover up any involvement they or certain others might have had in Watergate. The extent to which this is true, and who may have participated and to what degree, are questions that it would not be proper to address here. The proper forum for settling these matters is in the courts.

-- To the extent that I have been able to determine what probably happened in the tangled course of this affair, on the basis of my own recollections and of the conflicting accounts and evidence that I have seen, it would appear that one factor at work was that at critical points various people, each with his own perspective and his own responsibilities, saw the same situation with different eyes and heard the same words with different ears. What might have seemed insignificant to one seemed significant to another; what one saw in terms of public responsibility, another saw in terms of political opportunity; and mixed through it all, I am sure, was a concern on the part of many that the Watergate scandal should not be allowed to get in the way of what the Administration sought to achieve.

The truth about Watergate should be brought out -- in an orderly way, recognizing that the safeguards of judicial procedure are designed to find the truth, not to hide the truth.

With his selection of Archibald Cox -- who served both President Kennedy and President Johnson as Solicitor General -- as the special supervisory prosecutor for matters related to the case, Attorney General-designate Richardson has demonstrated his own determination to see the truth brought out. In this effort he has my full support.

Considering the number of persons involved in this case whose testimony might be subject to a claim of Executive privilege, I recognize that a clear definition of that claim has become central to the effort to arrive at the truth.

(MORE)

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Accordingly, Executive privilege will not be invoked as to any testimony concerning possible criminal conduct or discussions of possible criminal conduct, in the matters presently under investigation, including the Watergate affair and the alleged cover-up.

I want to emphasize that this statement is limited to my own recollections of what I said and did relating to security and to the Watergate. I have specifically avoided any attempt to explain what other parties may have said and done. My own information on those other matters is fragmentary, and to some extent contradictory. Additional information may be forthcoming of which I am unaware. It is also my understanding that the information which has been conveyed to me has also become available to those prosecuting these matters. Under such circumstances, it would be prejudicial and unfair of me to render my opinions on the activities of others; those judgments must be left to the judicial process, our best hope for achieving the just result that we all seek.

As more information is developed, I have no doubt that more questions will be raised. To the extent that I am able, I shall also seek to set forth the facts as known to me with respect to those questions.

# # #

Exhibit K

THE WHITE HOUSE  
WASHINGTON

June 19, 1973

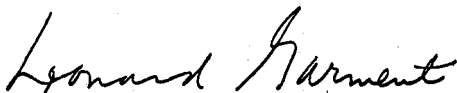
Dear Mr. Dean:

I am authorized by the President to inform you that the President will not invoke executive privilege, and you are released from any attorney-client privilege with regard to testimony you may give concerning the Watergate break-in, efforts to cover it up, or any other matters relevant to the inquiry of the Senate Select Committee.

Insofar as you may have information that is related to national security, it is for your counsel to advise you what lawfully may be disclosed. The President is not authorizing any release of legally protected national security material.

I advised the Senate Select Committee of this yesterday, and I am writing you so that you may have direct information about this.

Sincerely,



Leonard Garment  
Counsel to the President

Mr. John W. Dean III  
100 Quay Street  
Alexandria, Virginia 22314

cc: Mr. Samuel Dash, Senate Select Committee  
Mr. Fred Thompson, Senate Select Committee



*Received Aug 9, 1973  
J. A. [unclear]  
Special Counsel for the President*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES, et al.

Plaintiffs

v.

RICHARD M. NIXON, individually and as  
President of the United States.

Defendant

FILED	)
AUG 9 1972	)
	) JAMES F. DAVEY
	) CLERK

) Civil  
) Action  
) No. \_\_\_\_\_

1593-73

MOTION TO REDUCE TIME FOR ANSWER OR RESPONSE

Plaintiffs in this action hereby, by their attorneys,  
move this Court to shorten the period in which defendant  
Richard M. Nixon, President of the United States, may  
answer or otherwise respond to the complaint herein to  
not more than 20 days from the date of service of the  
summons and complaint.

Respectfully submitted,

*Samuel Dash*  
Samuel Dash  
Chief Counsel

*Fred D. Thompson*  
Fred D. Thompson  
Minority Counsel

*Rufus Edmisten*  
Rufus Edmisten  
Deputy Counsel

Sherman Cohn  
Eugene Gressman  
Jerome A. Barron  
Washington, D. C.  
Of Counsel

*James Hamilton*  
James Hamilton  
Assistant Chief Counsel

Arthur S. Miller  
Chief Consultant to  
the Select Committee  
Washington, D. C.  
Of Counsel

*Ronald D. Rotunda*  
Ronald D. Rotunda  
Assistant Counsel

United States Senate  
Washington, D. C. 20510  
Telephone Number 225-0531

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES, et al.

Plaintiffs

**v.**

RICHARD M. NIXON, individually and as President  
of the United States

Defendant

) Civil  
) Action  
) No.

1593-73

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
MOTION TO REDUCE TIME FOR ANSWER OR RESPONSE

Plaintiffs have today sued Richard M. Nixon, President of the United States, seeking a declaratory judgment and other relief to instruct and compel him to make available certain tapes and other materials that are the subject of two lawfully issued, but dishonored, subpoenas served upon him by the Select Committee.

Despite the fact that the President is sued in both his personal and official capacities, his counsel assert that, under Rule 12 (a), F.R. Civ. P., he has 60 days from the date of service of the complaint to answer or otherwise respond. \* Without conceding this, plaintiffs

\*Rule 12 (a) reads in pertinent part:  
 "A defendant shall serve his answer within 20 days after service of the summons and complaint upon him, except when service is made under Rule 4 (e) and a different time is prescribed in the order of court under the Statute of the United States or in the statute or rule of court of the state. ...The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim,... within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted."

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deem it appropriate to move the Court to shorten the President's time to answer from 60 to 20 days -- the time allowed under Rule 12 (a) for nongovernmental defendants.

Resolution of the controversy that is the subject of this lawsuit is undisputedly of great moment. The Select Committee, pursuant to its authority under S. Res. 60, has issued lawful subpoenas to the President to obtain certain tapes and other materials concerning alleged criminal activities relating to the Presidential campaign and election of 1972.\* Statements by the President and his present and former subordinates confirm that certain materials sought -- most particularly the tapes of five Presidential conversations with Mr. Dean -- are relevant to the Committee's investigation of such alleged criminal activities. The Select Committee has urgent and immediate need to obtain the subpoenaed material so that it can fully complete its continuing investigation. Yet, the President, invoking certain alleged Presidential powers, prerogatives, and privileges, has declined to make available the materials subpoenaed, thus presenting a fundamental and historic controversy between the Executive and the Legislative that this Court should decide.

We submit to the Court that the parameters of the Watergate affair must be promptly determined so that the uncertainty and divisiveness that is abroad in the nation can be ended. The Court, in the present motion, is asked to quicken that result. The Federal Rules do not specifically provide for reducing the time to answer, but there appears no

---

\* The President has asserted that he has sole possession, custody, and control of the subpoenaed materials.

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doubt that this Court can do so. As Professor Charles Alan Wright, now the President's Special Counsel, has written in his treatise on federal procedure:

"[A]lthough the federal rules do not expressly give the Court power to shorten the period, it probably has inherent power to do so in the face of special circumstances." Wright, and Miller, Federal Practice and Procedure § 1346, at 529-30 (1968)

For this proposition, Professor Wright correctly cites Studebaker Corp. v. Gittlin, 360 F.2d 692 (2nd Cir. 1966).\*

In addition to the national need for prompt determination of the present controversy, there are other considerations supporting the present request. The 60-day rule was propounded in the recognition that it takes a normal complaint against the government considerable time to sift through appropriate channels. In the usual circumstance, 60 days is needed to inform concerned officials of the lawsuit and allow them to make determinations as to an appropriate response. See A.B.A. Washington Institute on Federal Rules (Oct. 8, 1938) at 50, 239; cf., Ramsey v. United Mine Workers, 27 F.R.D. 423, 425 (D. Tenn. 1961).

These factors are not relevant here. This suit runs directly against the President. His own counsel have been served with the complaint and, apparently, will personally handle the case. The President and his counsel have been aware that this litigation was imminent since July 26, 1973, when the Select Committee in public session voted its instigation. Surely, the President's counsel are well advanced in their

---

\*See also Rule 1, F.R. Civ. P., which provides that these Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."

-4-

preparation for this case and can, without undue difficulty, answer or respond to the present complaint within 20 days.\*

In this regard, we observe that the President and his counsel have already responded with lengthy papers to the show cause order issued by this Court upon petition of the Special Prosecutor who seeks similar materials in connection with proceedings before the Grand Jury. The issues in the show cause proceeding and the present one are similar (although not identical) and the President's show cause papers demonstrate that his counsel are fully conversant with the basic principles they intend to urge in the case at bar.

For the above reasons, plaintiffs' motion to shorten the time to answer or otherwise respond should be granted.

Respectfully submitted,

*Samuel Dash*  
Samuel Dash  
Chief Counsel

*Fred D. Thompson*  
Fred D. Thompson  
Minority Counsel

*Rufus Edmisten*  
Rufus Edmisten  
Deputy Counsel

*James Hamilton*  
James Hamilton  
Assistant Chief Counsel

*Ronald D. Rotunda*  
Ronald D. Rotunda  
Assistant Counsel

United States Senate  
Washington, D.C. 20510  
Tel. No. 225-0531

Sherman Cohn  
Eugene Gressman  
Jerome A. Barron  
Washington, D.C.  
Of Counsel

Arthur S. Miller  
Chief Consultant to  
the Select Committee  
Washington, D.C.  
Of Counsel

\*This litigation is, of course, not one that involves a complicated evidentiary dispute where the relevant facts must be ascertained before answer. Here the basic factual situation is known--the Select Committee has subpoenaed materials relating to alleged criminal activity relevant to its inquiry and the President, asserting certain alleged privileges, has refused to make them available. The basic issues are thus ones of law on which the President's position, by now, must be well formulated.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES, et al.

Plaintiffs

v.

RICHARD M. NIXON,  
individually and as President of the United States

Defendant

Civil  
Action  
No. \_\_\_\_\_

ORDER

This matter having come before the Court on motion of  
Plaintiffs in the above-captioned action, it is this  
Day of August, 1973,

ORDERED, that defendant Richard M. Nixon, President  
of the United States, shall answer or otherwise respond to the  
complaint in this action within 20 days after service of the summons  
and complaint upon him.

\_\_\_\_\_  
United States District Judge  
Chief Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES, et al.

Plaintiffs

v.

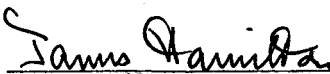
RICHARD M. NIXON, individually and as  
President of The United States.

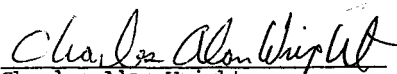
Defendant

Civil Action  
No. 1593-73

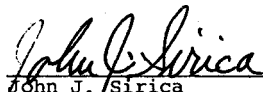
STIPULATION RE REDUCTION OF TIME TO ANSWER  
OR RESPOND

The parties to this action, by their undersigned attorneys, hereby, this 13th day of August, 1973, stipulate that defendant, Richard M. Nixon, President of The United States, shall answer or otherwise respond to the complaint herein on or before August 29, 1973, subject to the right of the defendant President to apply for an extension of time to answer or respond if necessary.

  
James Hamilton  
Assistant Chief Counsel,  
Select Committee on  
Presidential Campaign  
Activities  
Attorney for Plaintiffs

  
Charles Alan Wright  
Special Counsel to the  
President  
Attorney for Defendant

So Ordered:

  
John J. Sirica  
Chief Judge, United States  
District Court for the  
District of Columbia

8/13/73

EDWARD J. BAKER, JR., TENN., VICE CHAIRMAN  
 KENNETH E. TALMADGE, GA. EDWARD J. GURNEY, FLA.  
 DANIEL H. FREYER, HAWAII LOWELL P. WEICKER, JR., CONN.  
 JOSEPH H. MONTANA, N. MEX.

SAMUEL DASH  
 CHIEF COUNSEL AND STAFF DIRECTOR  
 FRED D. THOMPSON  
 MINORITY COUNSEL  
 RUFUS L. EDMISTEN  
 DEPUTY COUNSEL

## United States Senate

SELECT COMMITTEE ON  
 PRESIDENTIAL CAMPAIGN ACTIVITIES  
 (PURSUANT TO S. RES. 60, 92D CONGRESS)

WASHINGTON, D.C. 20510

August 22, 1973

Honorable John J. Sirica  
 Chief Judge  
 U. S. District Court  
 District of Columbia  
 U. S. Court House  
 Washington, D. C.

RE: SENATE SELECT COMMITTEE ON PRESIDENTIAL  
 CAMPAIGN ACTIVITIES, et al.

v.

RICHARD M. NIXON, individually and as President  
 of the United States

Civil Action No. 1593--73

Dear Judge Sirica:

As your Honor is aware, we filed our complaint in the above styled case on August 9, 1973. As stated in paragraph 25 of the complaint, the "public interest in, and need for, the swift completion of the functions of the Select Committee and the unique and critical Constitutional considerations raised by the actions of the defendant President warrant expedition of this action at all stages and prompt resolution of the dispute." Recognizing the need for expedition, the plaintiffs filed a motion to reduce to 20 days the time for answer or response to the complaint from the 60 days normally provided a government officer. The attorneys for the President thereupon



Judge Sirica

Page 2

stipulated that they would answer or move within 20 days. Accordingly, their answer or motion will be filed on or before August 29, 1973.

For the reasons discussed below, we think it proper that your Honor consider and decide our case in conjunction with the show cause proceeding brought by the Special Prosecutor. In that event, the plaintiffs would be prepared to file on August 29 a motion for summary judgment that would present for consideration the plaintiffs' position on the merits of the controversy. Thus, by next Wednesday, the issues in this case would be joined on the merits and on any other defense that the President may choose to assert.

We would be prepared to complete additional briefing and be ready for oral argument by Friday, September 7, 1973. In view of the fact that the attorneys for the President have already briefed, in the show cause proceeding, many issues closely similar to those presented in our law suit, and in view of the capacity for expedition that the attorneys for the President have demonstrated in the show cause proceeding, we would hope and expect that they can comply with the expedited schedule we have suggested.

We readily acknowledge the public interest in expediting the ultimate resolution of the proceeding brought by the Special Prosecutor. We also recognize that your Honor expressed in court this morning your hope to render a decision in the Special Prosecutor's case within a week. Nevertheless, we believe that the public interest would be better served by your Honor's deciding these two cases at the same time. We believe that this conclusion is supported by a consideration of the following factors:

- (1) The sole substantive issue in each case is that of executive privilege in the context of the proper relationship of the branches

Judge Sirica

Page 3

of government within our constitutional system. While there are differences in the way that issue is presented in the two cases, there is a large area of similarity and overlap. The fact that your Honor has already become acquainted with that issue in the context of the Special Prosecutor's proceeding will expedite the disposition of our case, if your Honor should hear it.

(2) With all deferences to the quality of the briefing and argument by both sides in the Special Prosecutor's case, we believe, in view of the special posture in which the executive privilege issue is presented in our case, that we would be in a position to enlighten certain aspects of that issue. Thus, we believe we would be of assistance to your Honor in deciding the Special Prosecutor's case as well as our own.

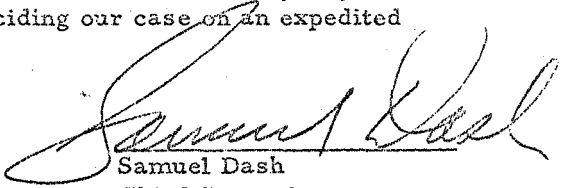
(3) In view of the closely related subject matters of these cases, 'it seems probable that they will eventually be consolidated at some step in the appellate process. Given this probability, and considering the expedited briefing and argument schedule we believe possible in our case, any delay that a consolidated determination of these cases by your Honor might entail in the eventual disposition of the Special Prosecutor's proceeding would be nonexistent or minimal.

Thus, while we acknowledge the need for expedition in the Special Prosecutor's case, we submit that the important public interest that accompanies both proceedings would best be served if your Honor were to consider and decide our case and the proceeding brought by the Special Prosecutor at the same time.

Judge Sirica

Page 4

Even if your Honor should choose to render a decision in the Special Prosecutor's case before our own, we believe the above considerations show the desirability of your Honor's hearing and deciding our case on an expedited schedule.

A handwritten signature in dark ink, appearing to read "Samuel Dash", written over a horizontal line.

Samuel Dash  
Chief Counsel

cc: Archibald Cox  
Charles A. Wright

WATERGATE SPECIAL PROSECUTION FORCE

United States Department of Justice

1425 K Street, N.W.

Washington, D.C. 20005

August 23, 1973

Honorable John J. Sirica  
Chief Judge  
United States District Court  
for the District of Columbia  
United States Court House  
Washington, D. C. 20001

Re: Senate Select Committee on Presidential  
Campaign Activities v. Richard M. Nixon  
Civil Action No. 1593-73

and

In re Grand Jury Subpoena Duces Tecum  
Issued to Richard M. Nixon, or any Sub-  
ordinate Officer, Official, or Employee  
with Custody or Control of Certain Docu-  
ments or Objects, Misc. No. 47-73

Dear Judge Sirica:

I am in receipt of a copy of a letter from Samuel Dash, Chief Counsel, Senate Select Committee on Presidential Campaign Activities, dated August 22, 1973, asking you to "consider and decide [the Committee's] case in conjunction with the show cause proceeding brought by the Special Prosecutor." I wish to state my opposition to any course that would have the effect of delaying the disposition of the grand jury's petition for enforcement of its subpoena. I oppose the Committee's request for two reasons. First, any delay in the grand jury proceeding significantly increases the risk that the matter will not be finally resolved before the grand jury's term expires on December 4. Second, the grand jury proceeding and the Committee's suit are quite distinct.

Naturally I recognize that the proceeding instituted by the Senate Committee raises a number of issues of considerable public importance, and thus I see no

basis to object to any request that the conduct of that action be expedited. My objection is simply to the Committee's request that disposition of the grand jury's petition be delayed to await the joinder of issue, the filing of motions and replies, and the holding of a hearing in the Committee's action. As your Honor indicated from the bench at the conclusion of the hearing held yesterday on the grand jury's petition, a ruling in our case may be possible within the next few days. It is unquestionably ripe for decision, since all of the relevant legal issues have been fully briefed and argued.

By contrast, in the Senate Committee's suit, the White House is not due to respond to the Committee's complaint until August 29, a date by which your Honor suggested the grand jury's petition might be decided. In addition, although there is no way to predict precisely what form the White House response will take in the Senate matter, it is entirely possible, or indeed probable, that the response will raise a variety of procedural and jurisdictional objections quite distinct from the issues being litigated in connection with the grand jury's subpoena. Some of the major distinctions indicating that it would be unwarranted to delay disposition of the executive privilege claim in the subpoena proceeding include possible arguments by the White House challenging the Committee's standing to sue under Article III or under the Senate Resolution creating the Committee, or contesting the Court's statutory jurisdiction to entertain the matter, or pointing to the criminal contempt statutes as providing the exclusive remedy for testing the validity of a legislative subpoena. None of those issues, of course, is involved in the grand jury matter and if raised by the White House in the Senate's suit would have to be addressed before the underlying merits could be reached.

In addition, as I suggested in my oral argument and in my briefs, the claim of executive privilege as against a legislative inquiry raises peculiar problems under the principle of separation of powers and the "political question" doctrine that are not involved when a court is asked to rule on the producibility of evidence in a judicial proceeding, including a grand jury investigation. Moreover, the relevant interests

which must be weighed when a claim of executive privilege is asserted against Congress are quite different than the interests involved in the grand jury proceeding. While the Committee refers to its investigation of alleged criminal conduct as a basis for overcoming the claim of executive privilege, it will surely be open to question whether that is a proper or sufficient legislative function in this context. Thus, it is apparent that the executive privilege issues in the two proceedings are quite different.

Let me reiterate, finally, that my only concern is that the grand jury's request for access to information necessary for its investigation not be retarded by consolidation with any other proceeding, no matter how important or analogous. Nothing in the points I have suggested would delay the Committee's interest in a prompt resolution of its rights, should the Court hold that its complaint is justiciable. But it is fair to say, I think, that there is no comparable urgency in their suit. As your Honor knows, the grand jury that has invoked this Court's aid in enforcement of the subpoena has been investigating the Watergate matter for almost 15 months. Its term is to expire barely three months from now, at the beginning of December 1973. As we stated in our main brief, it appears inappropriate to ask the grand jury to decide whether to indict or not to indict the principal figures in the Watergate matter until the courts have finally determined whether the grand jury may have access to the critical evidence sought by the subpoena -- and until that evidence is produced if the grand jury is held entitled to it. Since it is clear that this matter will be carried to the appellate courts, and since the passage of every day brings the grand jury closer to its expiration, it is exceedingly important that a decision on its petition not be delayed because of the pendency of collateral litigation. It would be tragic, I believe, if an avoidable delay of even a few weeks placed in jeopardy the grand jury's ability to secure this evidence and to consider it before it is discharged upon the completion of its term.

I hope you will find these points helpful in passing upon the Committee's request.

Sincerely,

*Archibald Cox*

ARCHIBALD COX  
Special Prosecutor

cc: Samuel Dash  
Charles Alan Wright

## THE WHITE HOUSE

WASHINGTON

23 August 1973

Dear Judge Sirica:

My associates and I have received a copy of the letter to you of August 22nd from Samuel Dash regarding Civil Action No. 1593-73, Senate Select Committee on Presidential Campaign Activities v. Nixon. We think it appropriate for us to comment on the procedural suggestions made by Mr. Dash on behalf of the Senate Select Committee.

In our judgment it would be quite premature to agree now on a procedure and schedule to be followed after we respond to the complaint in that action at a time when we have not responded and indeed have not finally determined what our response will be.

Even if it were clear how we will respond and what the appropriate next step by the Senate Select Committee after it has received our response would be, we think that the schedule proposed by Mr. Dash, with oral argument nine days after we have responded, is unrealistically short. We are conscious of the public interest in prompt disposition of these two cases. We believe that we have proceeded expeditiously in the case brought by Mr. Cox and we expect to do the same in the case brought by the Senate Select Committee. We showed that by voluntarily stipulating to respond to the Committee's suit in 20 days rather than the 60 days provided by the rules (and we had advised counsel for the Committee before their suit was filed that we expected to be able to stipulate to that effect, and would advise them definitely within 24 hours after receiving the complaint, but that we could not stipulate, for obvious reasons, before we had seen the complaint).

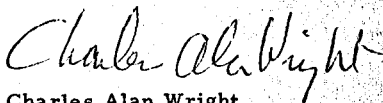


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There are some similarities between the central issues in the two cases but there are also many differences, both on the central issues and on the serious preliminary questions of jurisdiction and the like that are presented by the Committee's suit. If the Court is to be properly served by counsels, there must be adequate time for briefing by each side, and briefs should follow briefs in the usual fashion, rather than being prepared simultaneously. The matter is further complicated by the fact that on August 29th I resume my teaching duties at The University of Texas and thus must be in Austin at least Monday through Wednesday of each week.

When issue is joined in the Committee's suit in a fashion appropriate for determination by the Court, we will be ready, as we have been throughout both of these suits, to cooperate with the Court in working out a schedule for briefing and argument that will permit both sides to provide the Court with as much light as is possible on the issues the case presents.

Respectfully,



Charles Alan Wright  
Consultant to White House Counsel

Honorable John J. Sirica  
U.S. Court House  
3rd and Constitution Avenue, N.W.  
Room 2428  
Washington, D.C. 20001

cc: Honorable Archibald Cox  
Samuel Dash

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL )  
CAMPAIGN ACTIVITIES, suing in its own )  
name and in the name of the UNITED )  
STATES, )

and )

SAM J. ERVIN, JR.; HOWARD H. BAKER, JR.; )  
HERMAN E. TALMADGE; DANIEL K. INOUE; )  
JOSEPH M. MONTOYA; EDWARD J. GURNEY; )  
and LOWELL P. WEICKER, JR., as United )  
States Senators who are members of )  
the Senate Select Committee on )  
Presidential Campaign Activities )

Civil Action No. 1593-73

Plaintiffs

v.

RICHARD M. NIXON, individually and as )  
President of the United States )

Defendant

ANSWER

Richard M. Nixon, answering the complaint filed in  
above-styled cause, states as follows:

1. Admits the truth of the allegations contained in  
paragraph one of the complaint, but denies that plaintiffs  
acted within their authority in issuing the subpoenas duces  
tecum to the President of the United States and thereafter  
in instituting this action.

2. Denies the truth of the allegation contained in  
paragraph two of the complaint.

3. Admits the truth of the allegations contained in  
paragraph three of the complaint, but denies that plaintiffs  
are entitled to investigate criminal conduct; and further  
denies that plaintiffs are empowered to bring suit against  
the President of the United States.

4. Admits the truth of the allegations contained in paragraph four of the complaint, but denies that the members of the Senate Select Committee are empowered to bring suit in their official capacities as members of that Committee.

5. Admits the truth of the allegations contained in paragraph five of the complaint, but denies that the President of the United States can be sued in his official capacity; and further denies that he can be sued individually for acts performed in his official capacity.

6. Denies the truth of the allegations contained in paragraphs six through ten of the complaint.

7. Admits the truth of the allegations contained in paragraph eleven, but denies that plaintiffs are empowered to subpoena materials from the President of the United States.

8. Admits the truth of the allegations contained in paragraphs twelve through fifteen of the complaint.

9. Admits the truth of the allegation contained in paragraph sixteen of the complaint, but denies that any court has jurisdiction to quash, modify, or narrow a subpoena issued by a Committee of Congress.

10. Admits the truth of the allegations contained in paragraph seventeen of the complaint.

11. Alleges that he is without information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph eighteen of the complaint, and denies that he has conceded the relevancy of any "tapes" to plaintiffs' investigation.

12. Denies the truth of the allegations contained in paragraphs nineteen through twenty-five of the complaint.

In further defense to the complaint, Richard M. Nixon states as follows:

First Defense

That the complaint fails to state a claim upon which relief can be granted.

Second Defense

That this Court lacks jurisdiction over the person of Richard M. Nixon in this action, either individually or as President of the United States.

Third Defense

That this Court lacks jurisdiction over the subject matter of this action because:

(a) the matter in controversy does not exceed the sum or value of ten thousand dollars, exclusive of interest and costs, as required by 28 U.S.C. 1331;

(b) this is not an action commenced on behalf of the United States within the meaning of 28 U.S.C. 1345, because plaintiffs are not expressly authorized to sue on behalf of the United States by an Act of Congress; Senate Resolution 262, 70th Cong., 1st Sess. (1928) is not sufficient authorization to sue;

(c) Richard M. Nixon owes no duty, either individually or as President of the United States, to the plaintiffs that affords mandamus jurisdiction within the meaning of 28 U.S.C. 1361; and

(d) this matter is not reviewable under 5 U.S.C. 701-706 or any relevant statute because the plaintiffs have not suffered any legal wrong nor have they been adversely affected or aggrieved as the result of any agency action.

Fourth Defense

That this action presents no justiciable controversy as required by Article III of the United States Constitution, and 28 U.S.C. 2201 and 2202.

Fifth Defense

That plaintiffs lack standing to bring this action.

Sixth Defense

That Senate Resolution 60, 93rd Cong., 1st Sess. (1973), purports to authorize an investigation of alleged criminal conduct, and that upon information and belief the investigation by plaintiffs has been, in fact, a criminal investigation and trial conducted for the purpose of determining whether or not criminal acts have been committed and the guilt or innocence of individuals, which Resolution and investigation exceed the legislative powers granted to the Congress in Article I of the Constitution.

Seventh Defense

That the subpoenas upon which this action is predicated are null and void in that the Senate has not authorized the issuance of a subpoena to the President of the United States.

Eighth Defense

That plaintiffs have failed, as required by Senate Resolution 60, Sec. 3(a)(6), 93rd Cong., 1st Sess. (1973) to refer the President's action to the United States Senate for appropriate review and action.

Ninth Defense

That the subpoena duces tecum attached as Exhibit D to the complaint is so unreasonably broad and oppressive as to make compliance impossible.

Tenth Defense

That the relief sought by plaintiffs constitutes an unconstitutional attempt to interfere with the confidentiality of private records of conversations between the President of the United States and his closest advisers relating to the official duties of the President.

WHEREFORE, premises considered, the relief prayed for should be denied.

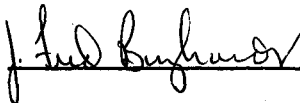
Respectfully submitted,

LEONARD GARMENT  
J. FRED BUZHARDT  
CHARLES ALAN WRIGHT  
DOUGLAS M. PARKER  
ROBERT T. ANDREWS  
THOMAS P. MARINIS, JR.  
RICHARD A. HAUSER

Attorneys for the President

The White House  
Washington, D.C. 20500  
Telephone Number: 456-1414

BY:



CERTIFICATE OF SERVICE

I, J. Fred Buzhardt, hereby certify that on this 29th day of August, 1973, I have served the foregoing Answer on counsel for the plaintiffs by causing copies thereof to be hand-delivered to the office of

Samuel Dash  
Chief Counsel  
Senate Select Committee on  
Presidential Campaign  
Activities  
United States Senate  
Washington, D.C. 20510

---

J. Fred Buzhardt

*Copy received 9/29/73 JTS*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

FILED

AUG 29 1973

JAMES F. DAVEY  
CLERK

SENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES, et al.

Plaintiffs

v.

RICHARD M. NIXON, individually and as  
President of the United States

Defendant

Civil Action  
No. 1593-73

MOTION FOR SUMMARY JUDGMENT

Plaintiffs, by their undersigned attorneys, hereby move the Court, pursuant to Rule 56, F. R. Civ. P., and 28 U.S. C. §2201 to grant them summary judgment in this cause and to adjudge and declare that:

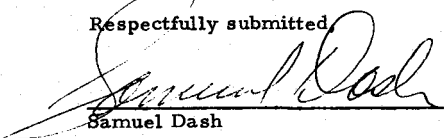
(1) The two subpoenas duces tecum issued to and served upon the defendant President by plaintiff Select Committee on Presidential Campaign Activities were lawfully issued and served and must therefore be complied with by defendant President.

(2) The defendant President's refusal and failure to comply with said subpoenas were unlawful and cannot be justified by resort to any asserted Presidential power, prerogative or privilege, or otherwise.



The grounds for this motion are more fully set forth in the accompanying Memorandum In Support Of Motion For Summary Judgment and Statement Of Material Facts As To Which There Is No Genuine Issue.

Respectfully submitted,



Samuel Dash

Chief Counsel

Fred D. Thompson

Minority Counsel

Rufus Edmisten

Deputy Counsel

James Hamilton

Assistant Chief Counsel

Richard B. Stewart

Special Counsel

Ronald D. Rotunda

Assistant Counsel

United States Senate

Washington, D. C. 20510

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Chief Consultant to  
the Select Committee  
Washington, D. C.  
Of Counsel

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES, et al.

Plaintiffs

v.

RICHARD M. NIXON, individually and as  
President of the United States

Defendant

Civil Action  
No. 1593-73

ORDER

This matter having come before the Court on plaintiffs' motion for summary judgment pursuant to Rule 56, F. R. Civ. P. and 28 U.S.C. §2201, and the Court being of the opinion that said motion should be granted, it is hereby this \_\_\_\_ day of September, 1973,

ORDERED, that plaintiffs' motion for summary judgment be and is granted, and it is further

ADJUDGED AND DECLARED, that:

(1) The two subpoenas duces tecum issued to and served upon the defendant President by plaintiff Select Committee On Presidential Campaign Activities were lawfully issued and served and must therefore be complied with by defendant President.

(2) The defendant President's refusal and failure to comply with said subpoenas were unlawful and cannot be justified by resort to any asserted Presidential power, prerogative or privilege, or otherwise.

---

John J. Sirica  
Chief Judge, United States District  
Court for the District of Columbia

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES, et al.,

Plaintiffs

v.

RICHARD M. NIXON, individually and as  
President of the United States,

Defendant

Civil Action  
No. 1593-73

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE  
ISSUE

1. The Senate Select Committee on Presidential Campaign Activities is a duly authorized and constituted committee of the Senate of the United States. It was created by Senate Resolution 60, 93rd Congress, 1st Session (1973), which was enacted by a unanimous vote of the Senate on February 7, 1973. (A copy of S. Res. 60 is attached to the complaint herein as Exhibit A.) Under S. Res. 60 the Select Committee is empowered to investigate and study "illegal, improper or unethical activities" in connection with the Presidential campaign and election of 1972 and to determine the necessity of new legislation "to safeguard the electoral process by which the President of the United States is chosen." The Select Committee is further authorized by a standing order of the Senate, Senate Resolution 262, 70th Congress, 1st Session (May 28, 1928), attached to the complaint as Exhibit B, "to bring suit on behalf of and in the name of the United States in any court of competent jurisdiction if the committee is of the opinion that the suit is necessary to the adequate performance of the powers vested in it or the duties imposed on it by the Constitution, resolution of the Senate, or other law."

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2. The duly designated members of the Select Committee are Senator Sam J. Ervin, Jr., of North Carolina (Chairman); Senator Howard H. Baker, Jr., of Tennessee (Vice-Chairman); Senator Herman E. Talmadge of Georgia; Senator Daniel K. Inouye of Hawaii; Senator Joseph M. Montoya of New Mexico; Senator Edward J. Gurney of Florida; and Senator Lowell P. Weicker, Jr., of Connecticut.

3. Section 3 (a) (5) of S. Res. 60, empowers the Select Committee

" . . . to require by subpoena or order any department, agency, officer, or employee of the executive branch of the United States Government, or any private person, firm, or corporation, or any officer or former officer or employee of any political committee or organization to produce for its consideration or for use as evidence in its investigation and study any books, checks, canceled checks, correspondence, communications, documents, papers, physical evidence, records, recordings, tapes, or materials relating to any of the matters or questions it is authorized to investigate and study which they or any of them may have in their custody or under their control; . . . "

4. On July 16, 1973, Alexander P. Butterfield, former Deputy Assistant to defendant Richard M. Nixon, President of the United States, testified that certain Presidential conversations, both face-to-face and telephonic, had been recorded by electronic means and are preserved on tapes. See, e.g., Select Committee Transcript, pp. 4144-52 (hereinafter cited as S. Tr.). The accuracy of Mr. Butterfield's testimony was later confirmed in all pertinent parts by a letter to Chairman Ervin from J. Fred Buzhardt, Counsel to the President, dated July 16, 1973. S. Tr. 4184.

5. On July 23, 1973, after informal attempts by the Select Committee to obtain certain tapes and other documents and materials relating to the Presidential campaign and election

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of 1972 had failed, the Committee addressed two subpoenas duces tecum, signed by its Chairman, to "President Richard M. Nixon, The White House, Washington, D. C.," which sought the tape recordings of specified conversations and other designated materials. Both subpoenas were duly served on July 23, 1973. The two subpoenas, with their proof of service, are attached to the complaint as Exhibits C and D.

6. All tapes and materials subpoenaed by the Select Committee are, and were at the time the subpoena was issued, under the sole possession, custody and control of the defendant President. However, until around the time of the revelation on July 16, 1973, of the existence of the tapes by Mr. Butterfield, the subpoenaed tapes, were under the immediate possession, custody and control of the Chief of the Technical Security Division of the Secret Service. S. Tr. 4166, 4182-84.

7. Both the aforesaid subpoenas were returnable on July 26, 1973, at 10 a.m. at the Caucus Room (Room 318), Old Senate Office Building. Neither on that date nor on any other date has the defendant President complied with the subpoenas or otherwise made available to the Select Committee the materials sought by the subpoenas. The defendant President's refusal to comply with the subpoenas was announced in a letter of July 25, 1973, which was addressed to Chairman Ervin and received by him on July 26, 1973. (This letter is appended to the complaint as Exhibit E.) In justification of his refusal to comply with the subpoenas, the defendant President relied in part on reasons stated in letters from him to Chairman Ervin dated July 6 and July 23, 1973 (which are appended to the complaint as Exhibits F and G).

8. The defendant President has not moved in this Court or any other Court to quash, modify or narrow the scope of either subpoena.

9. Seven individuals -- G. Gordon Liddy, E. Howard Hunt, James W. McCord, Bernard L. Barker, Frank A. Sturgis, Virgilio R. Gonzales and Eugenio R. Martinez -- have been indicted and convicted, by plea or verdict, for their complicity in the break-in of the Democratic National Committee Headquarters at the Watergate on June 17, 1973. The eight-count indictment in their case charged these seven individuals with the crimes of conspiracy to commit an offense and to defraud the United States (18 U.S.C. § 371), second degree burglary (22 D.C. Code § 1801 (b)), illegal interception of wire communications and attempted illegal interception of wire and oral communications (18 U.S.C. § 2511), and illegal possession of intercepting devices (23 D.C. Code § 543 (a)). Two other individuals, Jeb Stuart Magruder and Frederick LaRue, both high officials in the Committee to Re-elect the President, have pleaded guilty to criminal informations in lieu of indictment charging them with a conspiracy to commit an offense or to defraud the United States. The acts listed by one or both of these two informations as part of such conspiracy include the preparation and presentation of false testimony to the Federal Bureau of Investigation, the Grand Jury and at trial, the payment of cash funds to the seven defendants to ensure their silence, the destruction of incriminating records and the misrepresentation that the Central Intelligence Agency had an interest in limiting the criminal investigation. John Wesley Dean, III, and Herbert Lloyd Porter have also admitted their participation in a conspiracy to cover up the true facts of the Watergate episode. E.g., S. Tr. 1483-85, 2400, 2432, 2463, Testimony before the Select Committee, if believed, would tend to implicate yet other important former governmental and Committee to Re-elect the President officials in a conspiracy to obstruct justice and other illegal conduct, including, e.g., John D. Ehrlichman,

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H. R. Haldeman, John N. Mitchell, Robert C. Mardian, and Herbert W. Kalmbach. See, e.g., S. Tr. 1899-1901, 1907, 1913-14, 2063-64, 2171-73, 2183, 2196, 2199-2200, 2211-16, 2253, 2259, 2260-65, 2267-71, 2272-73, 2299-2300, 3174-78, 3578-79, 4992, 5018-20, 5031-34. In fact, there is evidence that, if believed, would tend to implicate the defendant President in criminal conduct. See, e.g., Paras. 11-15 below and S. Tr. 2621, 2352-53, 2397, 4783-84, 5147-48. There is also testimony that would exonerate the President and others who have been accused. S. Tr. 3287, 3301-03, 3307-08, 3355-58, 3375-79, 3416-17, 3322-23, 3332-33, 3342, 3435-40, 3799, 3803, 5419-37, 5465, 5716, 5721-22, 5784, 6037-6130.

10. The subpoena appended to the complaint as Exhibit C directed the defendant President to make available to the Select Committee certain specified electronic tapes that recorded five personal conversations "between President Nixon and John Wesley Dean III, discussing alleged criminal acts occurring in connection with the Presidential election of 1972." [Emphasis added] The five conversations occurred on September 15, 1972; February 28, 1973; March 13, 1973; and March 21, 1973, there being two conversations on the last mentioned date. The various accounts of the pertinent portions of these **conversations** are summarized in Paras. 11-15 below.

11. On September 15, 1972, the President met with John Dean and H. R. Haldeman from 4:27 p.m. to 6:17 p.m. This meeting took place shortly after the indictments of the seven original defendants had been issued. Different versions of this meeting have emerged.

(a) The Dean version: When Dean entered the Oval Office he found the President and Haldeman "in very good spirits and [his] reception was very warm and cordial."



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The President said that "Bob . . . had kept him posted on Dean's handling of the Watergate case." The President remarked that Dean "had done a good job" and that he "was pleased the case had stopped with Liddy." Dean said that while he "had been able to contain the case and assist in keeping it out of the White House," he "could make no assurances that the day would not come when this matter would start to unravel." Dean told the President that Committee to Re-elect the President lawyers in the civil suit "had been making ex parte contacts with the judge handling the case and that the judge was very understanding and trying to accomodate their problems," which "pleased" the President and caused him to state, "Well, that's helpful." Dean testified that, after the meeting, he had a "conviction" that the President was aware of the details of the cover-up. See, e.g., Exhibit H to the complaint, S. Tr. 2229-33, 3166.

(b) The Haldeman version(prepared after he heard the tape of this meeting): "The President knew John Dean had been concentrating for a three-month period on the investigation for the White House and I am sure therefore that the President thought it would be a good time to give Dean a pat on the back." "There was no mood of exuberance" but "it was good news . . . there was not any involvement by anyone in the White House. This confirmed what Mr. Dean had been telling us, and we had been reporting to the President over the period of the past three months." The President did not say, "Bob had kept me posted on your handling of the Watergate' or anything remotely resembling that," but instead said, "Hi, this was quite a day, you've got Watergate on the way' or something to that effect"

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and later did "commend Dean for his handling of the whole Watergate matter." Dean said "it had been quite a three months." While there was "some discussion about Judge Richey hearing the civil case and a comment that he would keep Roemer McPhee abreast of what was happening," Haldeman recalled no "comment about the judge trying to slow down the suit." Dean **indicated** "there was apparently no information that would be harmful that had not been uncovered already." Haldeman disagrees "with the conclusion that the President was aware of any type of cover-up" and states that "certainly Mr. Dean did not advise him of it at the September 15th meeting." See, e.g., Exhibit H to the Complaint and S. Tr. 6090-93.

(c) The White House versions: J. Fred Buzhardt, Special Counsel to the President, in his oral briefing to Fred Thompson, Select Committee Minority Counsel on the contents of the Dean Presidential conversations (see Para. 23, infra. and Exhibit J to the complaint), stated only that Dean reported on the Watergate indictments. The defendant President, in his August 22, 1973, San Clemente news conference, stated that Dean, on September 15th, declared that "there was not . . . 'a scintilla of evidence' indicating that anyone on the White House staff was involved in the planning of the Watergate break-in." (Emphasis added) See Washington Post, August 23rd, pp. A10-12.

12. The February 28, 1973, meeting was between Dean and the defendant President alone and lasted from 9:12 a.m. to 10:23 a.m.

(a) Dean version: Dean told the President that he (Dean) "was also involved in the post-June 17th activities regarding Watergate" and described to him why he "had legal problems," i.e., he "had been a conduit for many

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of the decisions that were made and, therefore, could be involved in an obstruction of justice." The President "would not accept his analysis" and told him he (Dean) "had no legal problems." See, e.g., Exhibit I to the complaint, S. Tr. 2317.

(b) White House versions: According to Buzhardt, Dean said there was no White House involvement in Watergate, that Maurice Stans was a victim of circumstances and that Charles Colson was a lightning rod because of his reputation. See Exhibit I to the complaint. The President, in his August 22nd news conference, did not specially deal with this meeting but did say that Dean, from September 1972 through March 1973 assured him that no one in the White House was involved in the "planning" of the Watergate break-in. Washington Post, August 23, 1973, p. All.

13. On March 13, 1973, the defendant President met with Dean from 12:02 p.m. to 2 p.m. Mr. Haldeman was present from 12:43 p.m. to 12:55 p.m.

(a) Dean version: Dean told the President about the "money demands being made by the seven convicted defendants . . . ." After Haldeman came in, Dean told the President "that there was no money to pay these individuals to meet their demands. He asked how . . . much it would cost." Dean estimated "as high as a million dollars or more" and the President said "that was no problem." Dean said the principal money demands came from Hunt. The President then said "Hunt had been promised Executive clemency," that "he had discussed this matter with Ehrlichman" and that, to his annoyance, "Colson had also discussed it with him later." The President asked Dean how the money was being paid to the defendants. Dean said, "The money was

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laundered so it could not be traced and then there were secret deliveries." See, e.g., Exhibit H to the complaint; S.Tr. 2323-25.

(b) Haldeman has no recollection of the events of the March 13th meeting. See Exhibit H to the complaint; S. Tr. 6100.

(c) White House versions: Mr. Buzhardt's reconstruction of this meeting omits all the Dean account presented above. According to Buzhardt, the President asked if Mitchell and Colson knew of Watergate (presumably beforehand) and Dean replied that there was nothing specific on Colson, he didn't know about Mitchell but Gordon Strachan could be involved. However, the defendant President, in his August 22nd news conference, stated that Dean had assured him from September 1972 through March 1973 that there had been absolutely no White House involvement in the "planning" of Watergate. Washington Post, August 23, 1973, p. All.

14. Dean met with the President on the morning of March 21, 1972, from 10:12 a.m. to 11:55 a.m. The White House log of Dean Presidential meetings states that "Mr. Haldeman was also present for at least part of the time." See Exhibit I to the complaint.

(a) Dean's version: Dean's purpose in this meeting was to give the President "a full report of all the facts that he knew and explain to him what he believed to be the implication of those facts." He began by saying "there was a cancer growing in the Presidency" and that, if it were not removed, "the President himself would be killed by it." Dean discussed the planning of the Watergate affair and its implementation. He discussed the January and February planning meetings, and mentioned he had informed Haldeman of them and received instructions

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from him to have nothing to do with the project. He said that Colson had put some pre-Watergate pressure on Magruder relating to the operation, but that he did not have the facts as to the degree of pressure. He said he was not sure if Mitchell had prior knowledge of the break-in, but had been told that both Mitchell and Haldeman (through Strachan) had received wiretap information. Dean then recounted "the highlights of the cover-up." He said that he, Ehrlichman, Haldeman, Mitchell and Kalmbach had been involved in raising and paying money to the defendants to achieve their silence. He said that money demands from the defendants, especially Hunt, were increasing and that Hunt was threatening to reveal the "seamy things . . . he had done for the White House," if his requirements were not met. Dean told the President that Magruder had committed perjury before the Grand Jury with Dean's assistance. He stated that more money and more perjury would be required "to perpetuate the cover-up." It was not until Dean had made this presentation that Haldeman came into the President's office. See, e.g., Exhibit H to the complaint; S. Tr. 2329-2334.

(b) Haldeman version (after hearing tape of conversation): Dean said no White House personnel were involved in planning of the break-in; Magruder was aware of the operation but he was not sure about Mitchell's knowledge. Dean was concerned that Colson's call to Magruder showed White House pressure and that Haldeman through Strachan had received the "fruits" of the operation. Dean said he made a report to Haldeman after the second planning meeting. "Regarding the post-June 17th situation, he indicated concern about two problems, money and clemency." He said Colson had spoken to Hunt regarding clemency. The President said,

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and Dean agreed, that the President could not offer clemency. Dean said he, Kalmbach and Haldeman were involved in money matters, and gave details of their involvement. He reported on Hunt's current "blackmail threat" that unless he received \$120,000 he would reveal the "seamy things" he had done for Ehrlichman." Dean said a million dollars eventually would be needed. "The President said, 'There is no problem in raising a million dollars, we can do that, but it would be wrong.'" The President inquired as to how this money could be paid and Dean discussed laundering procedures. Haldeman believes Dean is confusing the meetings of the 13th and the 21st because there is a similarity between Dean's version of the meeting on the 13th and Haldeman's view regarding the events of the 21st. See, e.g., Exhibit H to the complaint; S. Tr. 6112-15.

(c) Buzhardt version: Dean at first said there was no White House knowledge of Watergate prior to June 17, 1972, but then stated that Strachan probably knew and that possibly Haldeman, through Strachan, had seen the "fruits" of the wiretaps. He said Magruder probably, and Mitchell possibly, had prior knowledge. Also, Colson had made a call to Magruder relating to the operation. Ehrlichman was vulnerable because of his approval of Kalmbach's fund-raising efforts. Hunt was trying to blackmail Ehrlichman and might ultimately have to be paid a million dollars. The President stated that blackmail was wrong, would not work and that the truth would come out anyway. Dean said Colson talked to Hunt regarding executive clemency. He said possibly Haldeman, who had been involved in the return of \$350,000 to the Committee to Re-Elect the President, and Ehrlichman had no legal guilt in regard to money matters.

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He said nothing in regard to his role regarding money, nor did he discuss his part in the Magruder perjury. See Exhibit I to the complaint.

(d) Defendant President's version at August 22, 1973, news conference: Dean was concerned about raising "hush money" for the defendants. He said there was an attempt to blackmail the White House by one defendant and that, if \$120,000 was not paid, this defendant would reveal his activities in national security matters for which Ehrlichman had "particular responsibility." The President said the figure Dean mentioned as ultimately needed -- one million dollars -- could be raised but that "it's wrong. It won't work," without executive clemency, which he could not give. The President said that getting the money to the defendants was also a "problem" that would make any payoff plan unworkable. The President gave directions "to get this story out."

15. On the afternoon of March 21st, the President met with Dean from 5:20 p.m. to 6:01 p.m. Haldeman was present the entire time, Ronald Ziegler from 5:20 p.m. to 5:25 p.m. and Ehrlichman from 5:25 p.m. to 6:01 p.m.

(a) Dean version: Dean testified that he told the President, with Haldeman and Ehrlichman present, that Dean, Haldeman and Ehrlichman "were all indictable for obstruction of justice." He said it was not possible to perpetuate the cover-up and he would no longer participate in it. See, e.g., Exhibit H to the complaint; S. Tr. 2334-35.

(b) Haldeman version: The meeting dealt with questions of the Grand Jury, the Senate Committee and executive privilege. Ehrlichman stated he believed everyone should go to the Grand Jury; Dean said that would be appropriate if they all first obtained immunity. Ehrlichman was opposed to this idea. See, e.g., Exhibit H

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to the complaint; S. Tr. 6118.

(c) Ehrlichman's version basically corresponds with Haldeman's. See, e.g., S. Tr. 5716-18, 5650.

(d) Buzhardt version: It was tentatively decided that everyone would go to the Grand Jury. Dean, however, wanted immunity. Ehrlichman opposed this and also suggested that no one should claim executive privilege. Haldeman recommended that the whole affair be reduced to paper and the resulting document then released by the White House. The President instructed that these matters be discussed with Mitchell. See Exhibit I to the complaint.

16. In regard to tapes of the five foregoing conversations and other tapes informally requested by the Select Committee, the defendant President, in his letter dated July 23, 1973, to Chairman Ervin (Exhibit G to the complaint) stated:

"The fact is that the tapes would not finally settle the central issues before your Committee. Before their existence became publicly know, I personally listened to a number of them. The tapes are entirely consistent with what I know to be the truth and what I have stated to be the truth. However, as in any verbatim recording of informal conversations, they contain comments that persons with different perspectives and motivations would inevitably interpret in different ways."

17. The subpoena appended to the complaint as Exhibit D directed the defendant President to make available to the Select Committee documents and other materials "relating directly or indirectly to an attached list of individuals and to their activities, participation, responsibilities or involvement in any alleged criminal acts related to the Presidential election of 1972." (Emphasis added)

18. Plaintiffs and their counsel have not seen the documents subpoenaed and therefore cannot identify them with specificity. However, testimony before the Select Committee suggests certain documents within defendant President's possession, custody, and control that the subpoena may cover, for example:



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(a) The notes taken by H. R. Haldeman on yellow legal pads during his conversations with the defendant President respecting Watergate and related matters. Mr. Haldeman testified that the pages on which these notes were recorded are, in bulk, less than 1/8 inch in thickness. S. Tr. 6054.

(b) The daily news summaries prepared for the defendant President that contain in the margins or otherwise his handwritten comments and instructions relating to the Watergate affair. S. Tr. 2555.

(c) The various memoranda concerning the ITT affair referred to in a memorandum from Charles Colson to H. R. Haldeman, dated March 30, 1972, that was marked for identification before the Select Committee (see S. Tr. 6655) and is attached to this statement. The White House has already turned over an ITT file to the Special Prosecutor that may contain one or more of these memoranda or other materials that are covered by the Select Committee's subpoena.

19. The defendant President has himself revealed and has authorized and allowed his aides and subordinates, both present and past, to reveal the subject matters and contents of the materials sought by the two subpoenas, as discussed in paragraphs 20-24 below.

20. In his statement of May 22, 1972, the defendant President declared:

"Executive privilege will not be invoked as to any testimony concerning possible criminal conduct or discussions of possible criminal conduct, in the matters presently under investigation, including the Watergate affair and the alleged cover-up."

The defendant President's entire statement of that date is appended

-15-

to the complaint as Exhibit J. The testimony before the Select Committee from former and present aides and subordinates to defendant President relating to the criminal conduct under investigation by the Select Committee has been voluminous.

21. The defendant President's counsel, Leonard Garment, stated in a letter of June 19, 1973, to John Wesley Dean III, the defendant President's former counsel, that the defendant President would invoke neither executive privilege nor the attorney-client privilege in regard to Mr. Dean's testimony before the Select Committee. (This letter is attached to the complaint as Exhibit K.)

22. The defendant President, in July 1973, had certain tapes, including the tape recording of his conversation with Mr. Dean on September 15, 1972, delivered to H. R. Haldeman, a private citizen. Mr. Haldeman was asked by the defendant President to listen to the September 15th tape in order to assist the defendant President in preparing a response to the allegations made by Mr. Dean regarding that meeting. The defendant President, by his counsel, subsequently advised Mr. Haldeman that he would not invoke executive privilege in regard to Mr. Haldeman's testimony before the Select Committee concerning the contents of the September 15th tape and a portion of the March 21, 1973, tape (to which Mr. Haldeman also listened) that recorded the discussion between the defendant President and Mr. Dean during the time Mr. Haldeman was present. (See letter of August 10, 1973, to Chairman Ervin from Frank H. Strickler, Haldeman's attorney, which is attached to this statement.)

23. In early June 1973, the White House transmitted to the Select Committee a memorandum listing the oral communications, both face-to-face and telephonic, between the defendant President and Mr. Dean in 1972 and 1973. This memorandum also detailed the dates and times of these communications and, in the case of

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face-to-face meetings, the locations of those meetings and the other participants, if any. Subsequently, Fred D. Thompson, the Select Committee's Minority Counsel, received a telephone call from J. Fred Buzhardt, Special Counsel to the President, during which Mr. Buzhardt, in considerable detail, gave Mr. Thompson his understanding of the contents of certain communications between the defendant President and Mr. Dean. Mr. Buzhardt's reconstructions were immediately reduced to a memorandum by Mr. Thompson. See Exhibit I to the complaint.

24. In his San Clemente press conference on August 22, 1973, defendant President presented his views as to portions of the conversations between him and Mr. Dean on September 15, 1972, and March 21, 1973. His conclusions as to the contents of the tapes, found in his July 23rd letter to Chairman Ervin, is quoted above at Para. 16. Moreover, his May 22nd statement (Exhibit J to the complaint) contains his version of the entire Watergate affair.

Respectfully submitted,

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Ex 12.1 p 1

March 30, 1972

MEMORANDUM FOR: H.R. HALDEMAN  
 FROM: CHARLES COLSON  
 SUBJECT: ITT

There are four points in the analysis you outlined to MacGregor and me this morning with which MacGregor, Wally Johnson and I disagree:

1. Mitchell, Kleindienst or Mardian dealing with Eastland and MacGregor presumably dealing with the other members of the Committee guarantees a divided approach. One or the other has to call the shots. Kleindienst has already this morning told MacGregor that he, MacGregor, should not deal with any of the other Republican Senators (Scott, Cook, etc.) but rather should deal only through Hruska. In the kind of day-to-day operation this is, that is simply an untenable arrangement.

I know you and the President are concerned that all of us are taken away from other more important matters. You should be, however, equally concerned that Mitchell in the last 30 days has done little with respect to the campaign and that may be a more serious loss than MacGregor's time and mine.

2. On the one hand, you have the assessment of Kleindienst, Mardian and Mitchell as to what will happen in the Committee and on the Floor. On the other hand, you have the legislative assessment of MacGregor, Colson and Johnson which is very different. (Johnson spent from 1968-1970 as Minority Counsel of this same Committee and has been involved in all of the confirmation battles of this Administration either from the Committee end or from the Justice Department end. He left the Committee to go to Justice in 1970. MacGregor spent 10 years in Congress. I spent 5 years as a senior Senate assistant and 9 years in law practice, involving very considerable contact with the Hill. The Justice team simply has not had the same experience.)

July 4, 1974  
 JBS RSC

Ex 121 p. 2

Admittedly it is an opinion as to what we should do. Johnson and I unanimously do not believe that Kleindienst can be confirmed by June 1. Johnson does not feel he can be confirmed at all and on this point I am at least doubtful. I emphasize that this is an opinion and a judgment call. Lots of things could happen: We could get a big break in the case; the media could turn around and become sympathetic to Kleindienst; the Democrats could decide that they are better having him in the job than beating him. Obviously, there are many unforeseen possibilities, but as of now that is our best assessment. I would think that whatever decision we make now should be based on the most knowledgeable -- and I would add the most detached -- assessment of our legislative prospects.

Wally Johnson has done a detailed analysis of the various procedural moves that are likely to be made in Committee or on the Floor. He is not shooting from the hip. He has analyzed it and a Senate vote in his judgment cannot be achieved by June 1; the Democrats will only let it come to a vote if they have votes to reject Kleindienst, which is the least desirable outcome. Neither Johnson, MacGregor or Colson are prepared to predict whether we can hold the votes necessary to confirm him should the nomination in fact get to a vote.

3. Assuming MacGregor, Johnson and Colson are correct, then setting June 1 as our deadline date merely puts the hard decision off to a time when it will be considerably more volatile politically than it is today. Kleindienst's withdrawal will then be an admission of defeat but it will come two months closer to the election. There will have been two months more of rancor and publicity. In June Kleindienst will be a hot issue for the Democratic Convention. Confirmation of Kleindienst's replacement will also be vastly more difficult in June than it would be now. Obviously this again is opinion.
4. The most serious risk for us is being ignored in the analysis you gave us this morning -- there is the possibility of serious additional exposure by the continuation of this controversy. Kleindienst is not the target; the President is, but Kleindienst is the best available vehicle for the Democrats to get to the President. Make no mistake, the Democrats want to keep this case alive -- whatever happens to Kleindienst -- but the battle over Kleindienst elevates

Ex 121 p. 3

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the visibility of the ITT matter and, indeed, guarantees that the case will stay alive. It may stay alive in any event and hence the key question not addressed in your analysis is whether pendency or withdrawal of the Kleindienst nomination serves to increase the Democrat's desire to continue. That is the hardest call to make but for the following reasons it may be the most important point to make.

Neither Kleindienst, Mitchell nor Mardian know of the potential dangers. I have deliberately not told Kleindienst or Mitchell since both may be recalled as witnesses and Mardian does not understand the problem. Only Fred Fielding, myself and Ehrlichman have fully examined all the documents and/or information that could yet come out. A summary of some of these is attached.

EX 111 p. 4

1. Certain ITT files which were not shredded have been turned over to the SEC; there was talk yesterday in the Committee of subpoenaing these from ITT. These files would undermine Griswold's testimony that he made the decision not to take the appeal to the Supreme Court. Correspondence to Connally and Peterson credits the delay in Justica's filing of the appeal to the Supreme Court in the Grinnell case to direct intervention by Peterson and Connally. A memo sent to the Vice President, addressed "Dear Ted", from Ned Gerrity tends to contradict John Mitchell's testimony because it outlines Mitchell's agreement to talk to McLaren following Mitchell's meeting with Geneen in August 1970.

It would carry some weight in that the memo was written contemporaneous with the meeting. Both Mitchell and Geneen have testified they discussed policy only, not this case, and that Mitchell talked to no one else. The memo further states that Ehrlichman assured Geneen that the President had "instructed" the Justice Department with respect to the bigness policy.

(It is, of course, appropriate for the President to instruct the Justice Department on policy, but in the context of these hearings, that revelation would lay this case on the President's doorstep.) There is another internal Ryan to Merriam memo, which is not in the hands of the SEC; it follows the 1970 Agnew meeting and suggests that Kleindienst is the key man to pressure McLaren, implying that the Vice President would implement this action. We believe that all copies of this have been destroyed.

2. There is a Klein to Haldeman memo dated June 30, 1971 which of course precedes the date of the ITT settlement, setting forth the \$400,000 arrangement with ITT. Copies were addressed to Magruder, Mitchell and Timmons. This memo put the AG on constructive notice at least of the ITT commitment at that time and before the settlement, facts which he has denied under oath. We don't know whether we have recovered all the copies. If known, this would be considerably more damaging than Rieneke's statement. Magruder believes it is possible, the AG transmitted his copy to Magruder. Magruder doesn't have the copy he received; he only has a Xerox of the copy. In short, despite a search this memo could be lying around anywhere at 1701.

Ex 121 p. 5

3. The Justice Department has thus far resisted a request for their files, although their files were opened to Robert Hammond, one of Turner's deputies and a hold-over who is now a practicing Democratic lawyer in Washington. Hammond had access to several memos that could be embarrassing. Whether he kept them or not is unknown, but it is probable that he recalls them. One is a memo of April 1969 from Kleindienst and McLaren to Ehrlichman responding to an Ehrlichman request with respect to the rationale for bringing the case against ITT in the first place. There is a subsequent April 1970 memo from Hulin to McLaren stating that Ehrlichman had discussed his meeting with Gencen with the AG, and suggesting to McLaren that Mitchell could give McLaren "more specified guidance". There is another memo of September 1970 from Ehrlichman to the AG referring to an "understanding" with Gencen and complaining of McLaren's actions. There is a May 5, 1971 memo from Ehrlichman to the AG alluding to discussions between the President and the AG as to the "agreed upon ends" in the resolution of the ITT case and asking the AG whether Ehrlichman should work directly with McLaren or through Mitchell. There is also a memo to the President in the same time period. We know we have control of all the copies of this, but we don't have control of the original Ehrlichman memo to the AG. This memo would once again contradict Mitchell's testimony and more importantly directly involve the President. We believe we have absolute security on this file within Justice, provided no copies were made within Justice and provided there are no leaks. We have no idea of the distribution that took place within Justice.
4. Merriam's testimony will of necessity involve direct contact with Jack Gleason. I can't believe that after Merriam's testimony, Gleason will not be called as a witness.



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The Honorable Sam J. Ervin, Jr.  
 Chairman  
 Senate Select Committee on  
 Presidential Campaign Activities  
 United States Senate  
 New Senate Office Building, G308  
 Washington, D. C. 20510

Dear Senator Ervin:

After Mr. Haldeman finished his testimony I had a further discussion with him concerning details of his receipt and return of the President's tapes in July of this year. Mr. Haldeman has asked me to advise the Select Committee of the following details.

He believes that on July 10, 1973, he received the tape machine and the September 15 tape (plus phone call tapes for that day) from Steve Bull, who delivered them to Mr. Haldeman in a case at the residence of Larry Higby. Mr. Bull was on his way home when delivery was made. Mr. Haldeman took them to his residence later that evening and played the full tape of the September 15 meeting. He did not play the telephone tapes. After listening to the tape, he placed the tapes and the machine in the case and left same in his closet.

The next morning, July 11, 1973, Steve Bull delivered tapes of the President's meetings with Dean on three other dates. Mr. Haldeman is not sure what the other dates were. He also believes he was given some telephone tapes, for at least some of the same dates. Mr. Bull delivered these items in a manila envelope to the office Mr. Haldeman was using in the Executive Office Building. Mr. Haldeman took those tapes but, as he

WHITEFORD, HART, CARMICHAEL &amp; WILSON

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explained during the hearing, he did not listen to any of them.

On July 12, 1973, Mr. Haldeman put the tapes in the manila envelope into the case with the machine and other tapes and returned the whole package to Steve Bull, who he thinks picked up the case at the Executive Office Building.

I have discussed this matter with Mr. Fred D. Thompson, and am following his advice in sending this letter to you with the request that it be incorporated into the hearing record. If you desire a more formal submittal, please let me know.

Respectfully yours,



Frank H. Strickler

cc Hon. Howard H. Baker, Jr.  
Hon. Herman E. Talmadge  
Hon. Daniel K. Inouye  
Hon. Joseph M. Montoya  
Hon. Edward J. Gurney  
Hon. Lowell P. Weicker, Jr.  
  
Hon. Samuel Dash  
Hon. Fred D. Thompson

EX 113

THE WHITE HOUSE  
WASHINGTON

July 30, 1973

Dear Mr. Wilson:

This concerns your inquiry as to the extent of the President's waiver of executive privilege with regard to the testimony of Mr. Haldeman before the Senate Select Committee on Presidential Campaign Activities. Your inquiry was directed to Mr. Haldeman's knowledge of the contents of tape recordings of conversations of meetings in the President's office on September 15, 1972 and March 21, 1973.

Under the waiver of Executive Privilege stated by the President on May 22, 1973, Mr. Haldeman is not constrained by any claim of executive privilege as to conversations at meetings which Mr. Haldeman attended, if such conversations fall within the May 22, 1973 guidelines.

If asked to testify as to facts which he learned about meetings or portions of meetings which he did not attend, but of which he learned solely by listening to a tape recording of such meeting, the President has requested that you inform the Committee that Mr. Haldeman has been instructed by the President to decline to testify to such matters, and that the President, in so instructing Mr. Haldeman, is doing so pursuant to the constitutional doctrine of separation of powers.

Sincerely,



J. FRED BUZHARDT

Special Counsel to the President

Mr. John Wilson  
Whiteford, Hart, Carmody & Wilson  
815 Fifteenth Street, N. W.  
Washington, D. C. 20005

THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL )  
CAMPAIGN ACTIVITIES, et al )

Plaintiffs )

v. )

Civil Action  
No. 1593-73

RICHARD M. NIXON,  
individually and as President of the United States )

Defendant )

MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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Chief Counsel

Fred D. Thompson  
Minority Counsel

Rufus Edmisten  
Deputy Counsel

James Hamilton  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL )  
CAMPAIGN ACTIVITIES, et al. )

Plaintiffs )

v. )

Civil Action  
No. 1593-73

RICHARD M. NIXON, individually and as )  
President of the United States )

Defendant )

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The Select Committee has served upon the defendant President two subpoenas that seek tape recordings and other material relating to alleged criminal activity in connection with the presidential campaign and election of 1972. Upon his refusal to honor these subpoenas, plaintiffs instituted this suit. The present motion seeks summary judgment for plaintiffs and a declaration that defendant President's noncompliance with the subpoenas is unlawful.

At the outset this cause must be placed in proper perspective. This suit does not seek wholesale invasion of the President's files. It does not request a broad ruling that might hereafter serve as a dangerous precedent for the conduct of presidential business. Rather, it seeks only tapes and materials relating to criminal activity in the presidential

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campaign and election of 1972. There is no doubt that such criminal activity took place. Nine persons stand convicted, by plea or verdict, for crimes ranging from burglary to conspiracy to obstruct justice. What is in doubt, however, are the exact parameters of this criminality. The Select Committee, by unanimous vote of the Senate, has the mandate and responsibility to ferret out all the facts regarding the Watergate affair, both to aid the Senate in its legislative function and, in that connection, to inform the public, which has a right to know the total extent of the corruption that has beset our government. The materials requested by the subpoenas will provide crucial facts that will help lay to rest the severe contradictions and inconsistencies that, so far, abound.\*/

The President and his counsel asserted that the tapes and records sought by the Committee are protected by an absolute executive privilege. This privilege, they maintain, is fully applicable even if the materials sought concern communications by presidential aides to the President about criminal activities in which these aides were involved. They further assert that the President at all times was engaged in his proper, official duties and in no way was personally involved in criminal conduct, and that, while the privilege would dissipate if the President himself were culpable, this situation does not pertain.

We will dispute below the proposition that executive privilege covers the communications of an innocent President with guilty aides about

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\*/ The basic facts relevant to this litigation are set forth in the accompanying Statement of Material Facts As To Which There Is No Genuine Issue. In the interest of brevity, these facts will not be repeated here. For examples of such inconsistencies, see Statement, Paras. 11-15, where the various versions of the conversations recorded by the subpoenaed tapes are discussed.



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their criminal activities, but our arguments in this regard should not obscure a critical circumstance: Unfortunately, the involvement or noninvolvement of the President himself in that congeries of criminal activities falling under the general rubric of "Watergate" is very much an integral part of the present investigation. That fact is perhaps best epitomized by the persistent inquiry of Senator Baker -- "What did the President know and when did he know it?" John Wesley Dean, III, in his sworn testimony before the Select Committee, has accused the President of complicity in serious crimes. If Dean be believed, the President may be guilty of several crimes, including obstruction of a criminal investigation (18 U.S.C. § 1510), misprision of a felony (18 U.S.C. § 4), conspiracy to commit an offense or to defraud the United States (18 U.S.C. § 371), and unlawfully influencing a witness (18 U.S.C. § 1503). And Dean's charges are consistent with other evidence in the record that bears on the question of presidential involvement (there is, of course, also evidence in the record that would exonerate the defendant President of such charges).<sup>\*/</sup> In such circumstances, the Committee would be derelict if it did not proceed to further examination of the President's complicity or lack thereof, no matter how distasteful that task may be.

We proceed below to demonstrate that (1) this Court has both the power and the responsibility to resolve the issues before it, (2) the Select Committee is operating within the proper scope of its constitutional investigatory powers, (3) executive privilege does not protect the tapes and materials sought by the subpoenas, and (4) any

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<sup>\*/</sup> Concerning presidential involvement in the Watergate matter, see Statement, Paras. 9, 11-15.

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privilege that might have existed regarding the subpoenaed materials has been waived by the selective breach by the President and his aides of their supposed confidentiality.

- 5 -

I. The Court Has the Power and Responsibility to Resolve the Issue of Executive Privilege Presented Here.

In demonstrating that the issue of executive privilege presented by this litigation is fully appropriate for judicial resolution, it is first helpful to explain why this action is brought in its present form. In the usual case, the Committee, in addition to bringing suit, would have two other alternative remedies. (1) It could have its subpoena enforced by the Senate Sergeant at Arms.<sup>\*/</sup> (2) It could initiate contempt of Congress proceedings under 2 U.S.C. § 192.<sup>\*\*/</sup> In such circumstances, the recipient of the subpoena could raise a claim of privilege or other defense to the subpoena for judicial consideration either by a habeas corpus or tort proceeding against the Sergeant at Arms, see Anderson v. Dunn, 6 Wheat 204 (1821), or in defense of a criminal prosecution.

But these other procedural alternatives are inappropriate methods for the presentation and resolution of the executive privilege issue that is the focus of the present suit. It would be unseemly to send the Sergeant at Arms to the White House to arrest the President and bring him before the bar of the Senate. Moreover, a criminal proceeding against the President is a manifestly awkward vehicle for determining the serious constitutional question here presented; a civil lawsuit, with

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<sup>\*/</sup> The inherent power of each House of Congress to execute its own process and punish contempts of its authority was broadly sustained in Anderson v. Dunn, 6 Wheat. 204 (1821). See also Jurney v. MacCracken, 294 U.S. 125 (1935); In Re Chapman, 166 U.S. 661 (1897).

<sup>\*\*/</sup> This statute provides that: "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House . . . willfully makes a default . . . shall be deemed guilty of a misdemeanor . . . ."

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its flexibility in the molding of appropriate relief and its greater opportunities for expedition, presents a far more workable solution for the speedy determination of the constitutional issue at bar. Compare Sanders v. McClellan, 150 U.S. App. D.C. 58, 463 F.2d 894 (1972); Stamler v. Willis, 415 F.2d 1365 (7th Cir. 1969), cert. denied sub. nom. Ichord v. Stamler, 339 U.S. 929 (1970); and see S. Res. 262 (Exhibit B to the Complaint) authorizing suit by the Committee.<sup>\*/</sup> It is these considerations that have led us to the conclusion that the present action seeking declaratory and other relief is the most efficacious course to the resolution of the critically important issue before the Court.

The mere fact that the issue of privilege comes to the Court by way of suit by the Committee, rather than in a suit by the subpoena's recipient or in his defense to a criminal prosecution, cannot affect the Court's authority to resolve that issue. Nor is this suit precluded because it is directed at the President and asks the Court to resolve conflicting claims of executive and legislative power under the Constitution. Indeed, in the circumstances presented here, it is the responsibility of the judiciary, as the neutral third branch of government, to discharge its role "as the ultimate interpreter of the Constitution," Powell v. McCormack, 395 U.S. 486, 549 (1969), and mark the respective bounds of executive and legislative power.

The Supreme Court has repeatedly entertained and decided actions that were in form or substance constitutional controversies between Congress and the executive. For example, United States v. Lovett,

<sup>\*/</sup> Moreover, we note, although by no means accept, the assertion of defendant President's counsel that the President may not be criminally tried until he is impeached (Misc. No. 47-73, Resp. Brief in Opp., pp. 7-8, 22) a position that would, if accepted, foreclose the alternative of the criminal contempt procedures embodied in 2 U.S.C. § 192.

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328 U.S. 303 (1946), decided that a congressional effort to discharge designated individuals from government employment by cutting off salary appropriations was a constitutionally prohibited bill of attainder. The Attorney General, on behalf of the executive, asserted the invalidity of Congress' action, while Congress, represented by its own independent counsel, urged the contrary. In Myers v. United States, 272 U.S. 52 (1926), the Court passed on the President's constitutional power to remove a government employee from office contrary to congressional statute; the President was represented by the Attorney General, while Congress was represented by its own counsel. Congress' constitutional authority to limit the President's removal power was also at issue in Humphrey's Executor (Rathbun) v. United States, 295 U.S. 602 (1935). In The Pocket Veto Case, 219 U.S. 655 (1924), the Court considered the validity of a pocket veto by the President, who was represented by the Attorney General. The House Judiciary Committee was represented by its own counsel before the Supreme Court in opposition to the President's position. Other cases involving a judicial determination of the constitutional boundaries between congressional and executive powers include United States v. Klein, 13 Wall. 128 (1871) (congressional effort to curtail presidential pardon) and Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (presidential seizure of steel mills held unconstitutional as invasion of Congress' legislative powers). And recent decisions of this Court have reaffirmed that the principle of separation of powers does not preclude the Courts from resolving conflicting claims of presidential and congressional power.\*/

\*/ Kennedy v. Sampson, \_\_\_ F.Supp. \_\_\_ (D.D.C., C.A. No. 1583-72, August 15, 1973) (Senator's challenge to validity of President's pocket veto); Williams v. Phillips, \_\_\_ F. Supp. \_\_\_ (D.D.C., C.A. No. 490-73, June 11, 1973) (Senatorial challenge to validity of presidential appointment of acting OEO director without Senate confirmation); Local 2677, Government Employees, v. Phillips, 358 F. Supp 60 (D.D. C. 1973) (Presidential "phase-out" of OEO not authorized by Congress).

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Moreover, it is established that the Courts have full authority to resolve the precise issue presented here -- the validity of a claim of executive privilege. In United States v. Burr, 25 Fed. Cas. 30 (No. 14, 692d) (C.C.D. Va. 1807), Chief Justice Marshall, on circuit, issued a subpoena duces tecum to President Jefferson. While acknowledging that the President might object to production if the materials contained military or other "state secrets," the Chief Justice plainly indicated that the validity of any presidential claim of privilege would be decided by the Court. See 25 Fed. Cas. at 37. More recent decisions affirming the power of the judiciary to review executive assertions of evidentiary privilege are collected in United States v. Reynolds, 345 U.S. 1 (1953), where the Supreme Court held that "the court itself must determine whether the circumstances are appropriate for the claim of privilege" and stressed that "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers," 345 U.S. at 8, 9-10.\*

This Court's power to resolve the claim of executive privilege presented here is confirmed by two recent decisions of the Court of Appeals

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\*/ The teaching of Burr and Reynolds was recently reaffirmed in E. P. A. v. Mink, 410 U.S. 73 (1973). Mink in part involved a claim under the Freedom of Information Act for production of certain documents, relating to the underground nuclear explosion at Amchitka Island, Alaska, prepared by the "Undersecretaries Committee," a part of the National Security Council, "for transmittal to the President as advice and recommendations." The Court held that while certain portions of the requested material might be privileged from discovery by reason of the statutory exemption in the Freedom of Information Act for "inter-agency and intra-agency memorandums", portions consisting of factual matters would not, and that the Courts had the responsibility to determine, by in camera inspection if necessary, which materials were privileged and which not. While Mink arose under the Freedom of Information Act, the Court explicitly based its analysis on the general law of executive privilege. See 410 U.S. at 86-89 & n. 12.

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for this Circuit. In Committee for Nuclear Responsibility v. Seaborg, 149 U.S. App. D.C. 385, 463 F. 2d 788 (1971), the Court squarely rejected an executive assertion of unreviewable prerogative to withhold information. In Seaborg the government asserted a claim identical to that asserted by the defendant President here: That the executive, relying solely on its own assessment of the public interest, has absolute constitutional discretion to decide whether certain materials -- consisting, like the materials sought here, of intra-executive communications<sup>\*/</sup> -- should be disclosed. The Court of Appeals flatly rejected the executive claim in language that is directly controlling here:

"In our view, this claim of absolute immunity for documents in possession of an executive department or agency, upon the bald assertion of its head, is not sound law.

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"... An essential ingredient of our rule of law is the authority of the courts to determine whether an executive official or agency has complied with the Constitution and with the mandates of Congress which define and limit the authority of the executive. Any claim to executive absolutism cannot override the duty of the court to assure that an official has not exceeded his charter or flouted the legislative will.

"... Otherwise the head of an executive department would have the power on his own say so to cover up all evidence of fraud and corruption when a federal court or grand jury was investigating malfeasance in office, and this is not the law."

And in Soucie v. David, 145 U.S. App. D.C. 174, 448 F. 2d 1067 (1971), which arose in the context of the Congress' regulation of executive privilege through the Freedom of Information Act, the Court of Appeals confirmed judicial authority to

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<sup>\*/</sup> The materials related to the proposed underground nuclear test at Amchitka.

review an executive assertion of constitutional privilege against the congressional command of disclosure:

"If the Government asserts a constitutional privilege to withhold information . . . the court will not thereby be deprived of jurisdiction, for the judicial power extends to resolving the questions of separation of powers raised by the constitutional claim . . . ." 448 F. 2d at 1072 n.11.

In support of its conclusion, the Court of Appeals cited Powell v. McCormack, 395 U.S. 486 (1969), which held that the separation of powers principle does not preclude judicial resolution of an issue unless the language of the Constitution discloses a "textually demonstrable constitutional commitment of the issue to a coordinate political department." 395 U.S. at 518, quoting Baker v. Carr, 369 U.S. 186, 217 (1962). As we elaborate at greater length below, see p. 23, infra, the Constitution does not so much as mention any executive privilege to withhold information from Congress. Accordingly, there can be no claim here that there is a "textually demonstrable constitutional commitment of the issue" to the executive that would preclude the judiciary from deciding this case.

Finally, the fact that the claim of executive privilege is here asserted by the President and that he is named a party to this action does not make the case inappropriate for judicial resolution. As the Supreme Court has made clear in decisions such as Youngstown Sheet & Tube Co. v. Sawyer, supra (presidential seizure of steel mills), and Humphrey's Executor (Rathbun) v. United States, supra (presidential removal power), the conduct of the President is no more immune from judicial review than is that of any other executive officer. It is, to be sure, the normal practice in litigation to name a subordinate officer as the party defendant, even if the conduct sought to be reviewed is in reality the



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President's.\*/ But that course was precluded in this case by the defendant President's unexplained action in taking personal possession of the evidence sought by the Committee. Where, as here, effective relief can only be had against the President, he may be named as a party.\*\*/ Moreover, since the only relief now sought by plaintiffs in this action is a declaratory judgment, the question of judicial power to enforce a command against the chief executive is not before the Court.\*\*\*/

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\*/ For example, in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the party defendant was Secretary of Commerce Sawyer, who had been directed by President Truman to seize the nation's steel mills. But the real issue decided by the Court was whether the President had unconstitutionally usurped Congress' lawmaking powers.

\*\*/ See *Atlee v. Nixon*, 336 F. Supp. 790 (E.D. Pa. 1972); *Meyers v. Nixon*, 339 F. Supp. 1388 (S.D.N.Y. 1972); *Minnesota Chippewa Tribe v. Carlucci*, \_\_\_ F. Supp. \_\_\_ (D.D.C., C.A. No. 175-73, April 25, 1973)(subsequently rendered moot by presidential compliance). See also *United States v. Burr*, 25 Fed. Cas. 30 (No. 14, 692d) (C.C.D. Va. 1807).

In *Mississippi v. Johnson*, 4 Wall. 475 (1866), the Supreme Court declined to entertain a bill to enjoin the President's implementation of the Reconstruction Acts. That decision was, however, based on the nature of the issues involved --which the Court found to involve non-justiciable executive discretion-- rather than the identity of the defendant. By contrast, the issue involved here---the validity of a claim of executive privilege to withhold information --has regularly been decided by the courts.

\*\*\*/ While a declaratory judgment represents an authoritative resolution of the legal issues presented, it does not represent a judicial command to the parties. The President's assertions, in the show cause proceeding brought by the Special Prosecutor, that courts lack the power to enforce judicial orders against the chief executive (Misc. No. 47-73, Resp. Brief in Opp. pp. 5-8, 25-33) are therefore not relevant here. As the Supreme Court made clear in *Powell v. McCormack*, 395 U.S. 486 (1969), where it entered a declaratory judgment in a proceeding against certain officers of Congress, declaratory relief may be granted "independently of whether other forms of relief are appropriate." 395 U.S. at 518. Moreover, we assume that the defendant President will act in accordance with the Court's declaration of the law whether or not compulsory relief is granted. As the Supreme Court stated in *Powell v. McCormack*, *supra*, at 486, "it is an inadmissible suggestion" that action might be taken in disregard of a judicial determination."

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The foregoing discussion fully confirms this Court's authority to resolve the question of executive privilege presented in this action. Indeed, this case gives rise to an affirmative judicial responsibility to settle the conflicting claims of Congress and the Executive. We deal here with an exceptional and fully matured controversy between the two branches, in which the normal processes of political accommodation have proved unavailing. In these circumstances, to deny an authoritative judicial resolution of the controversy and leave the Executive and the Congress to a trial of strength by self help might lead to near intolerable strains on the constitutional fabric.<sup>\*/</sup> In fact, as the Supreme Court has recently observed in an opinion by Mr. Chief Justice Burger, the normal processes of political accommodation between executive and legislature can apparently function only where the basic contours of their respective constitutional powers are settled by the "neutral authority" of the judiciary:

"The check-and-balance mechanism, buttressed by unfettered debate in an open society with a free press, has not encouraged abuses of power or tolerated them long when they arose. This may be explained in part because the third branch has intervened with neutral authority. See, e.g., United States v. Lovett, 328 U.S. 303 (1946)." United States v. Brewster, 408 U.S. 501, 523. (1972).

The present controversy cries out for such intervention. For as Mr. Justice Jackson pointed out: "Some arbiter is almost indispensable when

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<sup>\*/</sup> The theoretical possibility of impeachment provides no answer to the present controversy. Quite apart from the practical and political difficulties in mounting an impeachment, the unhappy circumstances of President Andrew Johnson's impeachment proceeding indicate that impeachment should be resorted to with the utmost reluctance when all other alternatives are closed. Clearly it is preferable to have a constitutional controversy between the executive and legislature resolved by the judiciary as the neutral third branch rather than have the Congress act as judge in its own case through an impeachment proceeding against the President.

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power . . . is also balanced between different branches, as the legislative and the executive . . . . Each unit cannot be left to judge the limits of its own power." \*/ In such circumstances, "it is the responsibility of [the judiciary] to act as the ultimate interpreter of the Constitution." Powell v. McCormack, supra, at 549.

\*/ Jackson, The Struggle For Judicial Supremacy 9 (1941)

## II. The Evidence Subpenaed Is Vital to Congress' Exercise of Its Constitutional Powers.

Legislative investigations are "an established part of representative government." Tenney v. Brandhove, 341 U.S. 367, 377 (1951). At least since the 1792 investigation by the House of Representatives of the St. Clair expedition, Congress has repeatedly exercised a comprehensive power to investigate charges of maladministration and wrongdoing by executive officials. As explained in McGrain v. Daugherty, 273 U.S. 135 (1927) -- which sustained a Senate investigation of the Justice Department's role in the Teapot Dome scandal -- the investigatory power is a necessary component of Congress' lawmaking powers, for without information it is impossible to legislate wisely or effectively. But as the Supreme Court also pointed out in Watkins v. United States, 354 U.S. 178 (1957), investigation of executive wrongdoing serves other values as well:

"There is a power of the Congress to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government. That was the only kind of activity described by Woodrow Wilson in Congressional Government where he wrote: 'The informing function of Congress should be preferred even to its legislative function.' *Id.*, at 303. From the earliest times in its history, the Congress has assiduously performed an 'informing function' of this Nature." 354 U.S. at 200, n. 33.\*/

Congress' "informing function" is a necessary component of lawmaking power because it generates needed public support for legislation. Moreover, legislative scrutiny serves as a potent deterrent to official wrongdoing. As Louis D. Brandeis observed, "Sunshine is said to be the best of disinfectants; electric light the most efficient policeman." \*\*/

\*/ The Watkins principle was recently reaffirmed by this Court in In Re: Application of United States Senate Select Committee on Presidential Campaign Activities, Misc. No. 70-73, June 12, 1973, File Opin. at 17.

\*\*/ Brandeis, Other Peoples Money 92 (1914).

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And when evidence of such wrongdoing is unearthed in circumstances that generate doubts as to the executive's capacity to cleanse its own house, a thorough, public investigation by Congress can play a vital role in restoring public confidence in the self-corrective processes of government. In United States v. Rumely, 345 U.S. 41 (1953), the Supreme Court termed the congressional informing function "indispensable" and also quoted Woodrow Wilson with approval:

"It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function." Wilson, Congressional Government, 303. Id. at 43.

The above principles are most relevant to the work of the Select Committee. Created by unanimous vote of the Senate, the Committee is invested with a broad mandate <sup>\*/</sup> to get to the bottom of widespread but incompletely substantiated suspicions of serious wrongdoing at the highest executive levels in connection with the 1972 presidential campaign and election and to consider the need for corrective legislation. We believe that the Committee's work to date (together with the work of this Court and of the press) has achieved partial success in laying bare the extent of this corruption and restoring a measure of public confidence in our constitutional system. But the Committee's task is unfinished, and the

<sup>\*/</sup> Section 1 (a) of the unanimous Resolution establishing the Committee (Exhibit A to the Complaint) directs it to investigate "the extent, if any, to which illegal, improper, or unethical activities were engaged in by any persons in the presidential election of 1972."

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evidence which the Committee seeks from defendant President is vital to the completion of its work.

The subpoenas issued by the Committee to defendant, which were fully authorized by the Senate, <sup>\*/</sup> seek evidence whose pertinency and importance are obvious. The Committee has received conflicting evidence as to the extent of wrongdoing at the pinnacle of government. As already noted, there has been evidence tending to show that the Chief Executive himself was engaged in criminal conduct; see p. 3, supra. There has also been evidence tending to exonerate him of such charges. And the extent of criminality by other officials is also disputed. The pertinent evidence already obtained consists in considerable part of conflicting testimony by witnesses regarding their conversations with the President. The Committee would face difficult problems in resolving these conflicts if its assessment of the credibility of the respective witnesses were the sole basis of decision. Fortunately, the Committee's investigations have revealed the existence of documents and tape recordings of Presidential conversations. This neutral evidence, bearing directly on the matters in dispute, would prove of immense and perhaps decisive value in determining the precise extent of malfeasance in the executive branch.

An informed and accurate determination by the Committee of the extent of executive wrongdoing would be of great importance to Congress in deciding the need for and the form of corrective legislation respecting the conduct of political campaigns. Most particularly, it would aid in a determination whether legislative regulation of executive involvement in political campaigns is necessary. The evidence sought is also vital to

<sup>\*/</sup> Section 3 (a) (5) of the authorizing resolution (Exhibit A to the Complaint) empowers the Committee "to require by subpoena or order any department, agency, officer or employee of the executive branch of the United States Government to produce for its consideration or for use as evidence in its investigation and study any books, checks, cancelled checks, correspondence, communications, documents, papers, physical evidence, records, recordings, tapes, or materials relating to any of the matters or questions it is authorized to investigate and study which they or any of them may have in their custody or control."

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Congress' discharge of its associated informing function. \*/ How high executive corruption reached, and whether, in particular, the President himself was involved, is a great and unresolved public question. The evidence sought by the Committee promises to aid in the resolution of that great question. So long as key evidence is withheld, public confidence in the self-corrective processes of government will remain at low ebb. \*\*/

These considerations demonstrate that the evidence the Committee seeks is of great importance to Congress' discharge of its constitutional responsibilities. Yet the defendant President has steadfastly refused to make this crucial evidence available. This refusal flies in the face of the Supreme Court's assertion that: "It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to congressional subpoenas." Watkins v. United States, supra, at 187. Moreover, the effect of this refusal may be to shield the President's associates, or the President himself, from exposure of wrongdoing. In such circumstances, does the President have the right to disobey the Committee's lawfully issued subpoenas? That is the question which this Court must resolve.

\*/ Moreover, the integrity of Congress' own processes is at stake here. The conflicts in the testimony of witnesses before the Committee raise a serious question whether perjury has been committed. The neutral evidence sought by the Committee would be of vital importance in resolving that question and in successfully prosecuting any witness who sought to corrupt and obstruct the Committee's process of investigation.

\*\*/ Even if the Special Prosecutor were to succeed in obtaining the President's compliance with the subpoena issued by the grand jury, this would not obviate the need for compliance with the Committee's subpoenas. In the first place, even if the grand jury succeeds in obtaining the evidence it seeks, there is no assurance that it would be made available to Congress or the public. Second, the scope of the Committee's subpoenas is broader than that of the grand jury's subpoena.

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### III. There is no Executive Privilege to Suppress Evidence Relating to Executive Criminality

As the Supreme Court observed in Gravel v. United States, 408 U.S. 606, 627 (1972), the "so-called executive privilege" has never been applied to shield criminal conduct. It would be plainly intolerable if an allowed privilege to promote confidentiality of executive communications were extended to the point of permitting executive suppression of evidence bearing on criminal wrongdoing by those in high public office. If such were the law, an executive official "would have the power on his own say so to cover up all evidence of fraud and corruption." Committee for Nuclear Responsibility, Inc. v. Seaborg, 149 U.S. App D.C. 385, 391, 463 F.2d 788, 794 (1971). Accordingly, the defendant President may not lawfully assert any executive privilege to suppress evidence that bears either on his own possible criminal conduct, or on the possible criminal activities of his associates.

#### A. The President May Not Invoke Executive Privilege to Suppress Evidence Bearing on his Own Possible Criminality

Counsel for the defendant President have already conceded that he may not invoke executive privilege to cloak his own wrongdoing. Thus the Reply Brief filed on behalf of the President in the related show cause proceeding brought by the Special Prosecutor asserts:

"It is, of course, true that to 'the extent that the conversations [between the President and his aides] do not concern the legitimate affairs of Government and the performance of the official duties and responsibilities of the President and his staff' they are not protected by executive privilege." \*/

\*/ Misc. No. 47-73, Reply Brief for Resp., p. 11 n. 4. The internal quotation is from p. 21 of the Memorandum filed by the Special Prosecutor in that proceeding.



And the "Brief in Opposition" filed on behalf of the President in the same proceeding likewise appears to concede that executive privilege may not be used to suppress evidence bearing on the President's own criminality. <sup>\*/</sup>

However, counsel for the President have contended that this principle is inapplicable to the Watergate affair because the only possible wrongdoing involved was that of the President's aides:

"But although remarks made by others in conversations with the President may arguably be part of a criminal plan on their part, the President's participation in these conversations was in accordance with his Constitutional duty to see that the laws are faithfully executed. <sup>\*\*/</sup> "

With all respect, this simply begs the very question at issue --- whether the defendant President himself was engaged in unlawful conduct together with his associates. As we have shown in our Statement of Material Facts, the Committee has already received detailed sworn testimony which, were it believed, would tend to implicate the President in the violation of several criminal statutes. See Statement, paras. 9, 11-15; p. 3, supra.

Clearly, it can be no part of the President's "Constitutional duty to see that the laws are faithfully executed:" for the President to obstruct criminal investigations, or engage in misprision of a felony, or unlawfully influence a witness, or conspire to commit an offense or to defraud the United States.

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<sup>\*/</sup> See Misc. No. 47-73, Resp. Brief in Opp. pp. 21-23. At the oral argument before the Court, counsel for the President conceded that any executive privilege which the President might enjoy would be limited to matters relating to the performance of his official duties. Tr. p. 16

<sup>\*\*/</sup> Misc. No. 47-73, Resp. Brief in Opp., p. 23 (emphasis supplied). The same unsupported assertion is repeated in Respondent's Reply Brief in that proceeding, p. 11 n. 4:

". . . But surely it was part of the President's official duties to satisfy himself that justice was done in the Watergate affair. That others may have made remarks to him in the course of his inquiries about this matter that were part of a conspiracy on their part to obstruct justice, or may have later perjured themselves about what they said in these conversations, does not alter the fact that the President's participation was pursuant to his duty to take care that the laws be faithfully executed." (emphasis supplied).

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We hasten to add that the Committee has also received evidence that would exonerate the President of any such wrongdoing. But the testimonial evidence is conflicting and the President has in his possession additional evidence --- tapes and documents --- that could be of crucial and perhaps decisive value in resolving the conflicting testimony before the Committee and developing the true facts regarding his involvement. In these circumstances, the principle that the President may not invoke executive privilege to suppress evidence bearing on his own possible criminality --- a principle already conceded by the President's counsel --- is directly applicable. Accordingly, executive privilege cannot justify the President's refusal to comply with the Committee's subpoenas insofar as they demand evidence bearing on his own possible criminality.\*/

This aspect of the executive privilege issue was obscured in the show cause proceeding brought by the Special Prosecutor, apparently because of doubts as to whether the President could be subjected to criminal prosecution before impeachment,\*\*/ and further doubts as to the authority of the Special Prosecutor to institute any such prosecution in view of the President's ultimate control over the conduct of federal prosecutions.\*\*\*/

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\*/Since the defendant President has not asserted any privilege against self-incrimination, we put to one side the question whether any such privilege might be invoked with respect to the recordings and documents involved here.

\*\*/ Counsel for the President have asserted that the President is liable to prosecution only after he has been removed from office by impeachment. Misc. No. 47-73, Resp. Brief in Opp., pp. 7-8, 22. While we challenge the validity of that assertion, it plainly has no relevance to a legislative investigation.

\*\*\*/ See Misc. No. 47-73, Resp. Brief in Opp. pp. 24-25, Resp. Reply Brief pp. 2-8. The Respondent's Brief in Opposition, p. 22, points out that the Special Prosecutor has based his claim for the tapes of Presidential conversations on grounds "quite apart from anything they show about the involvement or non-involvement of the President."

But any such doubts have no application here. As we have shown, pp. 14-17, supra, the Congress has full, independent constitutional authority in connection with its legislative duties to investigate wrongdoing in the executive branch. Accordingly, insofar as the Committee's inquiry touches on possible criminal conduct of the defendant President, at least in circumstances where the Committee has already received serious and potentially credible evidence of such criminality, the President may not lawfully assert executive privilege to thwart the congressional inquiry.

B. There is No Executive Privilege to Suppress Evidence of Possible Criminal Conduct by the President's Subordinates

The President has asserted an absolute and unreviewable discretion to withhold from the Courts and Congress evidence bearing on serious criminal wrongdoing by high executive officials. But, as we have already shown, pp. 8-10, supra, the Courts have decisively rejected the claim of absolute privilege. The Court of Appeals for this Circuit has flatly said that the "claim of absolute immunity for documents in possession of an executive department or agency, upon the bald assertion of its head, is not sound law." Committee for Nuclear Responsibility, Inc. v. Seaborg, 149 U.S. App. D.C. 385, 389, 463 F.2d 788, 792 (1971). In the absence of any absolute privilege, then, the burden falls on the defendant President to justify judicial approbation of a claim of privilege that would permit the executive to suppress and withhold from Congress evidence bearing on the possible criminal conduct of executive officials. As we show, neither the Constitution, nor precedent, nor considerations of sound policy justify such a claim.

Courts, it is true, have recognized a limited privilege on the part of the executive to withhold evidence in the context of litigation

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involving a private citizen. See United States v. Reynolds, 345 U.S. 1 (1953). But, as we will show, even in litigation involving a private citizen the limited executive privilege gives way when it is sought to be used to suppress evidence of official wrongdoing. Moreover, we deal here not with discovery by a private party but with an evidentiary demand by Congress. The interest of Congress in obtaining evidence is weightier than that of a private litigant or even, we submit, that of the grand jury. For however regrettable it might be that a few guilty individuals go unpunished for want of relevant evidence, there is an even greater public interest in legislation, should it be required, to prevent the subversion of high executive office in the future. There is, moreover, a compelling public need for total revelation of the facts of the Watergate affair, a need that, most probably, can only be met by Congress in the exercise of its associated "informing function." Thus, even though the executive may enjoy a limited common law<sup>\*/</sup> privilege in judicial proceedings, it does not follow that it enjoys a similar privilege in the context of a congressional inquiry authorized by Article I of the Constitution, for "[w]here the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . . ." Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

Indeed, there are persuasive arguments, based on history, on the Framers' understanding, and on considerations of sound policy, that the executive enjoys no constitutional right to withhold any information from Congress. See R. Berger, Executive Privilege v. Congressional

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<sup>\*/</sup> See 8 Wright & Miller, Federal Practice and Procedure § 2019 at 175 & n. 44 (1970 ed.).

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Inquiry, 12 U.C.L.A. L.Rev. 1043, 1288 (1965) \*/ But that broad issue is not before the Court. We are not concerned here with any congressional effort to obtain materials bearing on the deliberation of lawful executive policy. We do not deal with a sweeping request for personnel files of government employees. The President has not asserted in response to the Committee's subpoenas that vital military or diplomatic secrets are involved. We deal only with a congressional demand for directly relevant evidence concerning possible criminal conduct by executive officials in connection with domestic political affairs. Moreover, the demand comes in a case where the existence of widespread criminal conduct by former executive officials and employees has already been substantiated by independent evidence and criminal convictions. In these circumstances, at least, there is no executive privilege to withhold the crucial evidence from Congress.

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The language of the Constitution does not support any privilege to suppress evidence of executive wrongdoing. Apart from the privilege against self-incrimination, the only evidentiary privilege found therein is granted to legislators by Article I. \*\* There is no mention

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\*/ As Professor Berger's careful and scholarly study shows, the claim by counsel for the President that there is a "long-standing privilege of the executive to refuse Congressional demands," Misc. No. 47-73, Resp. Brief in Opp. p. 11, is simply not supported by the historical facts. See also the Historical Appendix to this memorandum, which reviews portions of the historical record that are directly relevant to congressional investigation of executive maladministration and wrongdoing.

\*\*/ "[F]or any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. Art. I, Sec. 6, cl. 1.

The only reference to secrecy in the Constitution also occurs in Article I:

"Each House shall keep a Journal of its Proceedings and from time to time publish the same, excepting such parts as may in their Judgment require Secrecy . . . ." U.S. Const. Art. I, Sec. 5, cl. 3.

of any executive privilege in the Constitution. Nor can any implied privilege be erected on the strength of the President's constitutional duty to "take Care that the Laws be faithfully executed," for such duty can hardly justify suppression of evidence of executive lawbreaking.<sup>\*/</sup>

Nor can historical practice justify any privilege to suppress evidence of executive wrongdoing. Whatever the record may be in other areas, the executive has not heretofore asserted any blanket privilege to thwart congressional investigations into executive wrongdoing.<sup>\*\*</sup> Thus, in response to a congressional investigation into the disastrous St. Clair expedition, President Washington turned over all the pertinent documents: "not even the ugliest line on the flight of the beaten troops was eliminated."<sup>\*\*\*</sup> And Washington actually welcomed a congressional inquiry into alleged unlawful conduct by Secretary of the Treasury Hamilton.<sup>\*\*\*\*</sup>

In a later congressional inquiry into charges of official misconduct levied against Secretary of State Daniel Webster, former President Tyler was summoned and deposed under oath by a Select Committee, former President Adams was also deposed, and the sitting President, Polk, disgorged all relevant documents. The details of these and numerous other examples of acknowledgement by the executive of the

<sup>\*/</sup> The express privilege accorded Representatives and Senators under the Speech or Debate Clause has recently received a narrow reading by the Supreme Court. See *United States v. Brewster*, 408 U.S. 501 (1972); *Gravel v. United States*, 408 U.S. 606 (1972). In *Gravel*, the Court held that legislators and their aides must respond to inquiries concerning possible criminal conduct in which they may have engaged in preparing for legislative activities. Surely the executive, which enjoys no express immunity in the Constitution, cannot assert a broader privilege than legislators, who do enjoy such an immunity.

<sup>\*\*/</sup> President Jackson, for example, refused to produce documents relating to alleged wrongdoing by a former executive official, but only on the ground that the congressional investigation was being conducted in camera, thus depriving the individual in question of an opportunity for public vindication. See *R. Berger, Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A. L. Rev. 1043, 1094-95 (1965).

<sup>\*\*\*/</sup> 6 Freeman, *Biography of Washington* 339 (1954).

<sup>\*\*\*\*/</sup> See 33 Writings of Washington 95; 3 Annals of Congress 905, 907, 931-2, 934 (1792).

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congressional power of inquiry into official wrongdoing are provided in the Historical Appendix attached to this Memorandum. This historical review makes clear that executive privilege to suppress evidence of criminality cannot be justified by reference to historical practice; in fact, the historical practice strongly tends to establish the contrary. As Vice President Calhoun long ago conceded, the "conduct of public servants is a fair subject of the closest scrutiny "by Congress. 3 Cong. Deb. 574 (1826).

Considerations of sound policy do not support the privilege here asserted by the defendant President. We concede an executive interest in confidentiality to promote frank discussion. But the occasions on which it would be necessary to breach that confidentiality in order to secure crucial evidence on the extent of executive criminality would, we trust, be infrequent. The possibility of occasional inquiry into illegal executive activity can surely have little, if any, chilling effect on wholly lawful executive deliberations. And a rule exempting unlawful executive activity from disclosure would plainly invite intolerable abuses. For such a rule would permit "the head of an executive department . . . on his own say-so to cover up all evidence of fraud and corruption . . . ." Committee for Nuclear Responsibility, Inc. v. Seaborg, 149 U.S. App. D.C. 385, 391, 463 F.2d 788, 794 (1971).

Even in judicial proceedings, where the constitutional interest of Congress in obtaining needed information is absent, the courts have refused to accept an executive privilege to withhold information where official misconduct was involved. One of the earliest cases involving a claim of executive privilege in the context of charges of criminal wrongdoing by government officials was United States v. Dohoney and Fall (Sup. Ct. Dist. Col. 1926), a prosecution arising out of the Teapot Dome Scandal. The Court rejected a formal claim by the Secretary of the Navy to suppress testimony concerning conversations between a Navy Captain

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and a defendant regarding defense installations. The Court held that the testimony was relevant to the criminal charges, and that the government's interests in confidentiality could be adequately served by deleting the identity of a foreign power referred to in the conversation. See Stenographic Record, 2-3, 2381-2384, 2392 et seq., reprinted in Morgan and Maguire, Cases and Materials on Evidence (3d ed. 1951) 405-409. See also, Rosee v. Chicago Board of Trade, 36 F.R.D. 684, 690 (N.D. Ill. 1965) (privilege inapplicable to conspiracy to deprive plaintiff of his membership on the Board of Trade); Wood v. Breier 54 F.R.D. 7, 12 (E.D. Wisc. 1972) ("Even if executive privilege would normally be applicable, when the basis of a particular suit arises from the alleged misconduct or perversion of power by a government official, as it is claimed in the case before me, discovery may well be proper.")\*/

Moreover, it is clear that comparable evidentiary privileges do not apply where there is evidence of criminal conduct. The attorney-client, doctor-patient, and marital privileges are venerated by the law, but none applies where the communication is in furtherance of a criminal or fraudulent transaction. A. B. Dick Co. v. Marr, 95 F. Supp. 83, 102 (S. D. N. Y. 1950) (Medina, J.) appeal dismissed, 197 F.2d 498 (2d Cir.), cert. denied, 344 U.S. 878 (1952) (attorney-client privilege); Pollock v. United States, 202 F.2d 281, 286 (5th Cir.), cert. denied, 345 U.S. 993 (1953) (attorney-client privilege); Hank v. State, 148 Ind. 238, 240, 46 N.E. 127, 134 (1897) (doctor-patient privilege); State v. Grinnell, 116 Iowa 596, 88 N.W. 342 (1901) (doctor-patient privilege); Fraser v. United States, 145 F.2d \*/ Cases arising under state law and considering analogous executive privileges reach the same conclusion. Attorney General v. Tufts, 239 Mass. 458, 491-92, 132 N.E. 322, 326 (1921); Metzler v. United States 64 F.2d 203 (9th Cir. 1933) (privilege arising under state statute ).



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139 (6th Cir. 1944), cert denied sub. nom. Fraser v. Barton, 325 U.S. 849 (1945) (marital privilege); Wyatt v. United States, 362 U.S. 525 (1960) (marital privilege).

Even the petit and grand jurors' privilege --- clearly the most significant in the workings of the judicial process --- must yield in a case investigating criminal wrongdoing by a juror. Clark v. United States, 289 U.S. 1 (1933); See also United States v. Proctor & Gamble Co., 356 U.S. 667, 684 (1958); United States v. Proctor & Gamble Co., 25 F.R.D. 485 (D.N.J. 1960). Thus, although the confidentiality of judicial deliberations is central to the judicial process, Fayerweather v. Ritch, 195 U.S. 276, 306-07 (1904), it must yield when there is evidence of criminal misconduct. <sup>\*/</sup> Mr. Justice Cardozo, speaking for the Supreme Court in Clark, put it thus:

"The privilege takes as its postulate a genuine relation, honestly created and honestly maintained. If that condition is not satisfied, if the relation is merely a sham and pretense, the juror may not invoke a relation dishonestly assumed as a cover and cloak for the concealment of the truth." 289 U.S. at 14.

The principle enunciated by Justice Cardozo in Clark is, we submit, directly controlling here. Executive officials, like jurors, have important public responsibilities. But, like jurors, they may not use the cloak of their official position to suppress evidence of wrongdoing. As Mr. Chief Justice Burger asserted on behalf of the Supreme Court in United States v. Brewster, 408 U.S. 501, 521 (1972), "the laws of this country allow no place or employment as a sanctuary for crime . . . <sup>\*\*/</sup>

<sup>\*/</sup> See also 8 Wigmore, Evidence sec. 2372, at 757-58 (McNaughton rev. ed. 1962) (on judge's privilege); United States v. Caldwell, 25 Fed. Cas. 238 (No. 14708) (C. C. D. Pa. 1795) (subpenaes to judges upheld).

<sup>\*\*/</sup> The cited passage is a quotation from Lord Mansfield and was directed at an asserted congressional privilege, but the principle is equally applicable to the executive, particularly where the executive, unlike the Congress, enjoys no grant of privilege in the Constitution.

IV. The Selective Disclosures Already Authorized by the President Have Destroyed the Foundations of Any Executive Privilege in This Case.

It has been urged by the attorneys for the President that the enforcement of subpoenas directed to presidential conversations would cause "severe and irreparable" damage to the "institution of the Presidency," on the supposition that "once the totality of the confidential nature of the recordings is destroyed, no person could ever be assured that his own frank and candid comments to the President would not eventually be made public."\*/

As we have already pointed out, p. 23, supra, this claim is greatly overstated, and totally ignores the important public interest in detecting and preventing official misconduct. But even under the view of the defendant President himself there is no assurance of total confidentiality; indeed the President himself has engaged in several serious breaches of that confidentiality. The very fact that the defendant President has secretly taped the conversations without notifying the participants is a breach of the confidence that the defendant President purports to protect. He has, in addition, permitted his aides to testify concerning these conversations whose confidentiality he now claims to be of critical importance. He has also permitted at least one private citizen, H. R. Haldeman, to review tapes of conversations to which he was not a party in preparation for Mr. Haldeman's Select Committee testimony. (See S. Ex. 113, attached to Statement)\*\*/

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\*/ Misc. No. 47-73, Resp. Brief in Opp. 2, 18. See also the defendant President's letter of July 6, 1973, to Senator Ervin, appended as Exhibit F to the Complaint in the instant case.

\*\*/ The conclusion that the defendant knew, at the time he requested Haldeman to review the tapes, that Haldeman would testify as to their contents is inescapable. (S. Tr. 6091)

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And the defendant President has given out his own version of so much of those conversations as he has deemed in his own interest. For the defendant President now to assert a claim of privilege on the basis of a supposed need for inviolate confidentiality is, we respectfully submit, totally unpersuasive.

In particular, the defendant President's decision not to invoke executive privilege with respect to testimony by aides regarding their conversations with the President<sup>\*/</sup> is fatal to his belated effort to invoke privilege with respect to tape recordings of those same conversations. For if such conversations are not privileged against a testimonial description of their contents, how in logic can privilege be asserted with respect to the "description" contained in the tapes? In the legal sense, the tapes have become simply the best and most reliable evidence of non-privileged oral conversations. The Supreme Court has consistently ruled that, where it is otherwise proper to testify about oral conversations, taped recordings of those conversations are properly admissible as probative and corroborative of the truth concerning the testimony. Lopez v. United States, 373 U.S. 427, 437-440 (1963); Osborn v. United States, 385 U.S. 323, 326-330 (1966); United States v. White, 401 U.S. 745 (1971). To paraphrase language from Lopez, 373 U.S. at 439,

"Stripped to its essentials, [the defendant President's] argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment. For no other argument can justify excluding an accurate version of a conversation that the agent could testify to from memory."

<sup>\*/</sup> See Exhibit J to the Complaint at p. 8; Exhibit K to the Complaint.

We believe these decisions of the Supreme Court compel the conclusion that no privilege may be asserted by the defendant President with respect to the recordings of conversations where he has disclaimed any privilege with respect to testimony concerning those same conversations.

Moreover, it is repugnant to basic principles of fairness to allow a person, whomever he may be, to pick and choose among papers, or recordings, or even memory and offer only those portions that he considers most appropriate. As Mr. Chief Justice Vinson stated the basic principle in the context of testimony: "To uphold a claim of privilege in this case would open the way to distortion of facts by permitting a witness to select any stopping place in the testimony." Rogers v. United States, 340 U.S. 367, 371 (1950) (privilege against self-incrimination). But our law has not allowed such unfettered discretion; to the contrary, one who, by selective disclosure, breaches a confidence protected by a privilege is held to have forfeited that privilege. See generally, Tigar, Foreward: Waiver of Constitutional Rights; Disquiet in the Citadel, 84 Harv. L. Rev. 1, 9-10 (1970).<sup>\*/</sup>

The fundamental basis of this rule has been long accepted in our legal tradition. "[T]he moment confidence ceases, privilege ceases." Parkhurst v. Lawten, 36 Eng. Rep. 589, 596 (Ch. 1819). It has been applied in cases dealing with the various traditional privileges. E. g., Connecticut Mutual Life Ins. v. Shields, 18 F.R.D. 448, 451 (S.D.N.Y. 1955)(attorney-client privilege); Fraser v. United States, 145 F.2d 139, 144

<sup>\*/</sup> "Voluntary disclosure of any such fact [which may in any degree form a link in a chain of evidence against the witness] evinces, the argument runs, an intention not to rely upon the privilege . . . . The same general rule is followed with respect to all testimonial privileges, constitutionally-based or not . . . ." 84 Harv. L. Rev. at 9-10 (emphasis supplied).

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(6th Cir. 1944), cert. denied sub nom. Fraser v. Barton, 324 U.S. 849 (1945) (marital privilege); Pereira v. United States, 347 U.S. 1, 6-7 (1954) (marital privilege). The same rule of waiver has been held to apply where the government, or one of its officials, claims privilege. Fireman's Fund Indemnity Co. v. United States, 103 F. Supp. 915 (N.D. Fla.1952), aff'd, 211 F.2d 273 (5th Cir.), cert denied, 348 U.S. 855 (1954). Cf. Fleming v. Bernardi, 4 F.R.D. 270,272 (N.D. Ohio 1941); Mitchell v. Bass, 252 F.2d 513 (8th Cir. 1958).

United States v. Reynolds, 345 U.S. 1 (1953), relied on heavily by defendant President in Misc. No. 47-73 (Resp. Brief in Opp. pp. 20-21) is not supportive of his position, and in fact underscores the need for complete disclosure in the instant case. In Reynolds, a private tort action against the government, the government refused to produce its official investigation report on the crash of a military aircraft while on a confidential mission and also refused to produce related statements given by surviving crew members. However, the government offered to produce for examination the crew members, and to permit them to refresh their recollections from their previous statements and to testify as to all matters not classified. 345 U.S. at 3-5. The Court refused to order the production of more; weighing plaintiffs' "dubious showing of necessity" for the additional material including their refusal to pursue the "available alternative" of interviewing the crew members, "which might have given [them] the evidence to make out their case without forcing a showdown on the claim of privilege" as against the strong showing that the classified material had to do with highly secret military electronic equipment, it found for the government. Moreover, the Court noted, "there is nothing to suggest that

the electronic equipment, in this case, had any causal connection with the accident." The Court therupon concluded:

"Therefore, it should be possible for respondents to adduce the essential facts as to causation without resort to material touching upon military secrets. Respondents were given a reasonable opportunity to do just that, when petitioner formally offered to make the surviving crew members available for examination. We think that offer should have been accepted." 345 U.S. at 11.

Reynolds is factually quite remote from the present case.

Here, it is true, the defendant President has permitted various persons to testify before the Select Committee. But their testimony, rather than clearing up the essential facts as to the involvement in criminal conduct of the various people concerned, has been sharply contradictory and less than the best evidence at hand.<sup>\*/</sup> Moreover, the defendant himself has made repeated statements and summations of his version of the events which in turn contradict some of the testimony before the Committee. Indeed, the defendant President, while summarizing his conclusions based on his review of some of the material in his possession, admits that others, upon a review of that same material, could reach different conclusions. Letter to Senator Ervin of July 23, 1973 (exhibit G attached to the Complaint). Moreover, this is not a situation, as in Reynolds, where the material withheld arguably has no relevant connection with the inquiry. It is, in fact, openly conceded by all persons that the tapes in the defendant President's possession are highly relevant. They could obviously be quite significant in clarifying the contradictions regarding the involvement of the defendant President, or of his closest associates, in criminal wrongdoing.

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<sup>\*/</sup> In fact, the President has persisted in withholding the only evidence --- recordings and documents --- whose veracity, unlike testimony, is not readily subject to challenge.

The settled principles of waiver of privilege, largely developed in court suits, should apply with special force where information is sought by Congress in pursuit of a legitimate legislative purpose. Here Congress must deal with a crisis of great importance to our system of government. Perhaps its amelioration and the prevention of its reoccurrence will require far reaching legislation to regulate political campaign practices and executive involvement in such campaigns. If Congress were kept in ignorance of what has happened and what might happen again in our system as it is now constituted, Congress would be seriously hampered in discharging its constitutional duties. To accept, in the face of conflicting testimony, a single version of what is contained in the papers and tapes --- particularly the version of one who, evidence suggests, may be implicated in the very conspiracy that is the subject of the Committee's inquiry --- could well be worse than acting in ignorance. In these circumstances, no individual should be permitted to toy with Congress and its decisional processes. This, it is respectfully submitted, is the classic situation for the application of a waiver doctrine to whatever prerogative of silence the defendant President might otherwise assert.

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CONCLUSION

We have shown that the evidence sought by the Committee's subpoenas is of vital importance to the discharge of Congress' constitutional responsibilities. We have also shown that the defendant President has no right or privilege to suppress and withhold from Congress evidence bearing directly on his possible criminal conduct or that of others in executive office. Particularly where the President has authorized testimonial disclosure of matters under investigation, he cannot lawfully obstruct Congress' effort to obtain all relevant evidence and determine the extent of involvement in Watergate by the President and other high officials.\*/

But the issues presented here transcend the immediate questions of the extent of criminal conduct by various executive officials in this matter, important as those questions are. This case also raises the far more fundamental issue of the executive's accountability to the Rule of Law.

\*/ In these circumstances, the observation of Wigmore is highly pertinent:

"The public (in the words of Lord Hardwicke) has a right to every man's evidence. Is there any reason why this right should suffer an exception when the desired knowledge is in the possession of a person occupying at the moment the office of chief executive of a state?

"There is no reason at all. His temporary duties as an official cannot overcome his permanent and fundamental duty as a citizen and as a debtor to justice."

8 Wigmore, Evidence § 2370 (c) (McNaughton rev. ed. 1961) (emphasis in original). See also United States v. Bryan 339 U.S. 323, 331 (1950); Branzburg v. Hayes 408 U.S. 665, 688 n.26 (1972).



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Involved here is the question whether the President of the United States has such prerogative, right, and privilege as to be answerable to no one except in an impeachment proceeding. The defendant President's position, bottomed on a claim of naked executive privilege, is that he, and he alone, can decide whether to release, to whom, and how much. It is his position that he can remain silent entirely or may cull through the evidence and release only those matters favorable to his predetermined position, retaining that which does not lend support.

It is also his position that there is no force that can reach him as long as he is President--no court nor House of Congress. As long as he retains his office, he contends, he is immune from any force of law save as his own conscience or interest shall otherwise dictate. He asserts that it is only by an impeachment and a conviction thereon that he is answerable, even for his own crimes.

It is respectfully submitted that such a claim strikes at the very heart of our system of government. For once the President becomes so immune by privilege that he cannot be reached by force of law short of impeachment, he will become much as the monarch from whom our form of government constituted a revulsion.

Moreover, if the position of defendant President were accepted, immunity from the Rule of Law and the ordinary processes of government would not be limited to the President himself, but could be extended, at his sole discretion and pleasure, to every one of the two and one-half million officers or employees of the executive branch. This would represent an expanse of executive absolutism that even the Bourbons might have envied.

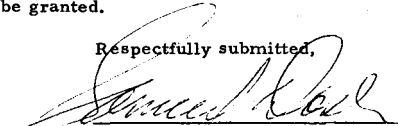
Such claims of executive absolutism were long ago rejected by the Framers and those that followed them. Merely by way of illustration is an early decision by one of the great Justices of the Supreme Court in the formative years of the nation. Gilchrest v. Collector, 10 Fed. Cas. 355 (Case No. 5, 420) (C. C. D. S. C. 1808) (Johnson J.) The incident involved was trivial compared to Watergate; a collector of customs had detained a ship in violation of statute. But the same great principle presented here was also involved there, for the executive sought to excuse the collector's conduct on the ground that it had been commanded by the President, and that the President in turn was not subject to the courts but only to impeachment. Justice Johnson flatly rejected the claim that "the security of the citizen lies in the President's liability to impeachment." 10 Fed. Cas. at 365. For to accept such an argument, observed the Justice, would in practical effect mean:

"That the whole executive department in all its ramifications, civil, military, and naval, would be left absolutely at large, in their conduct to individuals . . . . But such is not the genius of our constitution. The law assigns everyone his duty and his rights; and for enforcing the one and maintaining the other, courts of justice are instituted." 10 Fed. Cas. at 365.

\* \* \*

For the reasons stated above, the Plaintiffs' Motion For Summary Judgment should be granted.

Respectfully submitted,



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HISTORICAL APPENDIX

This Appendix will not retrace the careful study by Professor Berger, Executive Privilege v. Congressional Inquiry, 12 U.C.L.A. L. Rev. 1044, 1288 (1965), which fully refutes the notion that historical practice supports a claim of absolute executive privilege to withhold information from the Congress. Rather it will selectively consider those historical examples involving charges of criminal wrongdoing and corruption in the Executive Branch. When historical analysis is limited to such examples it is found that the Executive in fact follows a practice of disclosure: Presidents and their closest aides have responded to subpoenas; Presidents and former Presidents have submitted to depositions; they have appeared under oath before congressional committees to answer charges of wrongdoing and corruption; they have disclosed great volumes of documentary evidence. While the record is not uniformly consistent, it tends strongly to show that previous Presidents and other high executive officials have generally acknowledged a legal duty to respond with pertinent evidence when corruption, crime or other wrongdoing is indicated.

THE ENGLISH TRADITION

The duty to supply evidence has long been recognized in England, from where our common law system derives. As Jeremy Bentham observed:

"Are men of the first rank and consideration --- are men high in office --- men whose time is not less valuable to the public than themselves --- are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every petty cause? Yes, as far as it is necessary, they and everybody. . . . Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach, while a chimney-sweeper and a barrow-woman were in dispute about a halfpennyworth of apples and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly."

4 The Works of Jeremy Bentham 320 - 321 (J. Bowring ed. 1843).

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The Supreme Court has recently quoted this passage with approval in Branzburg v. Hayes, 408 U.S. 665, 688 n.26 (1972).

At common law, only the Monarch of England, and no other person, was given an immunity from testifying, 8 Wigmore § 2371, at 749. \*/ Thus, when evidence was needed from the Prince of Wales --- who afterwards became King Edward VII --- the Prince was summoned, and he testified about possible cheating at the card table by the plaintiff. Even a commoner from the jury box was allowed to ask a question of the Heir-Apparent. \*\*/

#### THE INTENT OF THE FRAMERS

The available evidence of the period surrounding the adoption of the Constitution in 1789 indicates that there was no intent by the Framers to clothe the President with the privileges of the English King. James Wilson rejected "the Perogatives of the British Monarch as a proper guide in defining the Executive powers . . . ." 1 Farrand, Records of the Federal Convention of 1787, at 65-66 (1911). As Charles Pickney affirmed in a Senate Speech of March 5, 1800:

"[The framers] well knew how oppressively the power of undefined privileges had been exercised in Great Britain, and were determined no such authority should ever be exercised here.

\* \* \* \*

"No privilege of this kind was intended for your Executive, nor any except that which I have mentioned for your Legislature." 3 Farrand, Records of the Federal Convention of 1787, at 384-85 (1911).

See also 4 Elliot's Debates (2d Ed. 1836), at 108 - 09 (remarks of Iredell at the North Carolina Ratification Convention); 2 Elliot's

\*/ Many argued that even the King was not above the law. See, e.g., S. D'Ewes, Journal of all the Parliaments during the Reign of Queen Elizabeth 238 (1682) (Speech of Peter Wentworth in 1575); " . . . The King ought not to be under man, but under God and under the Law, because the Law maketh him a King . . . . "

\*\*/ 8 Wigmore, § 2371, at 749 n. 2; See Notable British Trial Series, The Baccarat Case 3, 75 (Shore ed. 1932); Abinger, Forty years at the Bar (1930), at 84.

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Debates (2d ed. 1836), at 480 (remarks of James Wilson).

This nation's Presidents, from the very first, have until now upheld the common law tradition that even a President is not above the law.

PRESIDENT GEORGE WASHINGTON

The first example of a congressional inquiry into possible executive malfeasance occurred in 1792, when the House began an inquiry into the failure of the St. Clair Expedition. The House Committee was to inquire into "the causes of the failure of the late expedition . . . and . . . to call for such persons, papers . . . as may be necessary to assist their inquiries." 3 Annals of Cong. 493 (1792), cited in Berger, supra, at 1079 n. 188. Though Washington at a cabinet meeting decided that he had a discretion not to produce the evidence called for by the House, this unofficial opinion was never communicated to Congress. Berger, supra at 1080. More importantly, whatever his private assertion, all the St. Clair documents were in fact turned over to the House; "not even the ugliest line on the flight of the beaten troops was eliminated." 6 Freeman, Biography of Washington 339 (1954) cited in Berger, supra at 1080 n. 195. The Secretaries of the Treasury and War appeared in person to make explanation. 3 Annals of Cong. 1106 (1792). \*/ One contemporary congressional critic of the investigation (W. Smith) acknowledged that "[I]n any case where it shall appear that the Supreme Executive has not done his duty, he should be fully in favor of an inquiry." 3 Annals of Cong. 491 (1792), cited in Berger, supra at 1080 n. 195.

\*/ Washington instructed his Secretary of War on April 4, 1792: "You will lay before the House of Representatives such papers from your Department as are requested by the enclosed Resolution." 32 The Writings of Washington 15 (1939). See Berger, supra at 1080 - 81 nn. 195, 197, and 199.

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About the same time, Washington welcomed a rumored investigation of possible wrongdoing by his Secretary of the Treasury, Alexander Hamilton. See 33 The Writings of Washington 95 (1940), Letter to Pendleton, September 23, 1793, cited in Berger, supra at 1081 n. 200. James Madison, an advocate of the Resolutions charging Hamilton with grave derelictions, declared it to be a duty of the Secretary, "in complying with the orders of the House, to inform the House how the law had been executed . . . to explain his own conduct." Lee, an opponent of the Resolutions, basically agreed. 3 Annals of Cong. 934, 931 - 32 (1792), cited in Berger, supra at 1081 n. 201. The power to investigate official conduct was apparently never questioned. Eventually Hamilton was exonerated. Berger supra, at 1081 n. 201.

PRESIDENT THOMAS JEFFERSON

In the now famous case of United States v. Burr, 25 Fed. Cas. 30 (Nov. 14692d) (C.C. Va 1807) Chief Justice Marshall, on circuit, held that the court had "the right to issue a subpoena against the President." Id. at 34-36. Burr's lawyers had sought to obtain evidence in the hands of the President relevant to Burr's criminal trial. Jefferson objected, but it is clear that he attempted fully to comply and in fact did comply with the subpoena. Berger, supra, at 1107 & n. 333.

PRESIDENT JAMES MONROE

On January 3, 1818, President James Monroe became the second President to be served a subpoena while in office. Summoned as a witness in behalf of the defendant in the court martial of Dr. William Barton, President Monroe was requested to appear "at the Navy Yard in the City of Philadelphia on Wednesday the 14th day of January 1818 at eleven o'clock in the forenoon."<sup>\*</sup> In November of 1817 Dr. Barton had been granted two interviews with the President to press his claim for a position at the Naval hospital at Philadelphia. Dr. Barton received his appointment and Dr. Thomas Harris (who had been replaced as a result of Barton's appointment) then brought charges of "intrigue and misconduct" against Barton. Barton's meetings with the President were cited as contributing factors. The Judge Advocate then issued the summons to the President.<sup>\*\*</sup> At the President's direction, Secretary of State John Quincy Adams sought the opinion of Attorney General Wirt as to the proper course the President should pursue. A true copy of that unpublished opinion in its entirety

<sup>\*</sup> A copy of the summons submitted to President Monroe is in Attorney General's Papers: letters received from State Department, Record Group 60, National Archives Building.

<sup>\*\*</sup> Richard Rush to the President [Monroe] Nov. 6, 1817, Records of the Office of Judge Advocate General (Navy), Record Group 125 (Records of General Courts Martials and Courts of Inquiry, Microcopy M-272, case 282), National Archives Building. [Hereinafter cited as Navy Records]; P. L. Pleadwell, William Paul Crippen Barton (1786-1856), surgeon, United States Navy — a pioneer in American naval medicine, 46 The Military Surgeon (March 1920) at 260-62.



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is attached to this Historical Appendix. The opinion by Wirt is especially significant in that it was issued in the early days of our Republic; see Stuart v. Laird, 5 U.S. (1 Cr.) 299, 309 (1803).

The opinion of the Attorney General states, inter alia:

"A subpoena ad testificandum may I think be properly awarded to the President of the U. S. My reasons for this opinion are stated by the Chief Justice of the U. S. in the case of Aaron Burr--Burr's trial vol. 1 page 180 & seq. . . .

\* \* \* \*

"The return, however, which I would advise is this: if the process has been executed on the President in the usual form, by an officer or an individual, let the person serving it be instructed to make an endorsement like this - 'January 1818, executed on the President of the U. S. who stated that his official duties would not admit of his absence from the seat of government, but that he would hold himself ready, at all times, to state, in the form of a deposition, and facts, relevant to the prosecution, which were within his knowledge, and which might be called for by the court or the party.'\*\*/

President Monroe on the back of the summons stated that his official duties would preclude his appearance at the court martial, but he would "be ready & willing to communicate, in the form of a deposition any information I may possess, relating to the subject matter in question."\*\*/ Subsequently, President Monroe submitted answers to the interrogatories forwarded to him by the court.\*\*\*/

#### PRESIDENTS JOHN TYLER AND JOHN QUINCY ADAMS

On April 9, 1846, Daniel Webster was accused by Representative Ingersoll in the House of improperly making disbursements from the Presidential Secret Service Fund--a fund appropriated by the Congress to allow the President to purchase the services of spies and conspirators, and for use in clandestine operations in the course of foreign relations. Cong. Globe, April 9, 1846, at 636, 638. On April 20, 1846, President Polk responded by providing the House with documents and a list of the amounts of the various expenditures from the Secret Service Fund, but refused to produce documentation on the purposes for which the funds were used on the ground that the statute creating the

\*/ William Wirt to John Quincy Adams, January 13, 1818, Navy Records.

\*\*/ President James Monroe to George M. Dallas (on the back of summons), January 21, 1818, Navy Records.

\*\*\*/ President James Monroe to George M. Dallas, February 14, 1818, Navy records. Monroe's answers arrived only after the court dismissed the case. William Paul Crillion Barton to Secretary of the Navy, Samuel L. Southard, October 4, 1823, Navy Records.

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fund specifically made such documentation immune from disclosure. Cong. Globe 698 (Apr. 20, 1846). Moreover, all of the transactions occurred prior to Polk's incumbency, and he questioned his authority to disclose materials deemed confidential by his predecessors. Id.

President Polk's unwillingness to respond completely to the House requests for information led to the creation of two distinct select committees to investigate the matter. See The Secret Fund [Discussion of charges of misuse of State Department funds by Daniel Webster], Cong. Globe, April 27, 1846, at 733-35. Polk's concern about revealing the confidences of a predecessor President was rendered moot because former President Tyler was subpoenaed and testified before both select committees. See H. R. Rep. No. 684, 29th Cong., 1st Sess. (1846) at 8-11; H.R. Rep. No. 686, 29th Cong., 1st Sess., (1846) at 22-23. Former President John Quincy Adams filed a deposition with one of the select committees. H.R. Rep. 686, at 28. Both former Presidents gave evidence, under oath, about their use of the secret fund while President and testified about conversation with their aides. With the conclusion of the testimony the House had secured the information it deemed relevant and the select committee investigating Daniel Webster reported it was satisfied that he was innocent of any wrongdoing. See 2 Geo. Curtis, Life of Daniel Webster 283 (1870). See also 4 Richardson, Messages and Papers of the Presidents 435 (Message of President Polk to the House).

#### PRESIDENT ABRAHAM LINCOLN

During the civil war, President Lincoln appeared before the House Judiciary Committee to deny under oath that his wife was a co-conspirator with one "Chevalier" Henry Wycoff in a premature release ("leak") of the President's forthcoming message to Congress which appeared in the New York Herald in December, 1861. The New York Tribune, for example, reported on February 14, 1862:

"President Lincoln today [the 13th] voluntarily appeared before the House Judiciary Committee and gave testimony in the matter of the premature publication in the Herald of a portion of his last annual message . . . ." New York Tribune, Feb. 14, 1862, at 1.

At least four other contemporary newspapers stated that the President

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appeared before the Committee. New York Times, Feb. 14, 1862, at 8; Philadelphia Inquirer, Feb. 14, 1862, at 1; New York Herald, Feb. 14, 1862, at 1; Boston Morning Journal, Feb. 18, 1862, at 4.

PRESIDENT ULYSSES S. GRANT

In connection with the so-called whiskey fraud cases during Grant's tenure in the White House, President Grant submitted to a criminal deposition to give evidence concerning his confidential secretary, General Orville E. Babcock, who was accused of participation in the frauds. See John A. Carpenter, Ulysses S. Grant 152 (1970); Grant testified about conversations with Babcock, his confidential secretary. New York Times, Feb. 13, 1876, at 1; Feb 14, 1876, at 1. Moreover, Grant was once arrested while President for fast driving in a horse and buggy. The arresting policeman was profuse in his apologies when he recognized the President but the President said: "Officer, do your duty." Geo. Stimpson, Nuggets of Knowledge, at 54.

PRESIDENT THEODORE ROOSEVELT

President Theodore Roosevelt, on two separate occasions after leaving the White House, voluntarily testified before Congressional investigating committees regarding events during his Presidency. In 1911, he appeared before a special House Committee to testify about the circumstances involved in the questionable acquisition in 1907 of the Tennessee Coal & Iron Company by U.S. Steel. House Special Committee on the Investigation of the United States Steel Corporation, United States Steel Corporation Hearings, 62d Cong., 1st Sess. 1369 et seq. (1911).

In 1912 Roosevelt appeared before a Senate Subcommittee investigating the propriety of certain corporate contributions to Roosevelt's 1904 presidential campaign. Senate Committee on Privileges and Elections, Campaign Contributions, Hearings, 62d Cong., 1st Sess., on S. Res. 79 and S. Res. 386, Oct. 16, 1912, at 177-96; 469-527. See also E. Morison, 7 The Letters of Theodore Roosevelt 602-25 (1954).

PRESIDENT WARREN G. HARDING

In April 1922 the United States Senate adopted two resolutions which ultimately led to the disclosure of the infamous Teapot Dome scandal. One resolution directed the Secretaries of the Navy and Interior Departments to "inform the Senate, if not incompatible with the public interest," about "all proposed operating agreements" upon the Teapot Dome reserve.\*/ The second resolution authorized the Committee on Public Lands and Surveys "to investigate the entire subject of leases upon naval oil reserves," and also asked that the Secretary of the Interior be directed to send to the Senate all the facts about the leasing of Naval Oil Reserves to private citizens and corporations.\*\*/

In response to the latter resolution, Secretary of the Interior Albert Fall forwarded a veritable mountain of materials to the Senate Committee on Public Lands and Surveys. \*\*\*/ There appeared to be no withholding of information from Congress by the executive branch.

In the concluding remarks of his comprehensive report to the President on the Naval Oil Reserves, Secretary Fall states that it is his "frank desire that those entitled to know, and the public generally, who are, of course so entitled, may have an explanation frankly and freely and fully given of the acts, policies, and motives of at least one, and speaking for the Secretary of the Navy, of two members of " the President's official family.\*\*\*\*/ In apparent concurrence, President Harding forwarded Secretary Fall's report to the Senate under his signature with the following observation:

\*/ See 62 Cong. R&C. 5567-5568 (April 15, 1922).

\*\*/ See 62 Cong. Rec. 5792 (April 21, 1922), 6096-6097 (April 22, 1922).

\*\*\*/ See U. S. Congress, Senate Committee on Public Lands and Surveys. Leases upon Naval Oil Reserves. Hearings, 67 Cong., 2d Sess. 3142-3143 (1924).

\*\*\*\*/ Message from the President, etc., S. Doc. No. 210, 67th Cong., 2d Sess. 26-27 (1922).

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I am sure I am correct in construing the impelling purpose of the Secretary of the Interior in making to me this report. It is not to be construed as a defense of either specific acts or the general policies followed in dealing with the problems incident to the handling of the naval reserves, but is designed to afford that explanation to which the Senate is entitled, and which will prove helpful to the country generally in appraising the administration of these matters of great public concern. I think it is only fair to say in this connection that the policy which has been adopted by the Secretary of the Navy and the Secretary of the Interior in dealing with these matters was submitted to me prior to the adoption thereof, and the policy decided upon and the subsequent acts have at all times had my entire approval.\*/

PRESIDENT DWIGHT D. EISENHOWER

During the congressional investigation of the Dixon-Yates affair, the Senate sought to obtain a copy of a controversial memorandum by Adophe Wensell. Power Policy: Dixon-Yates Contract, Hearings on S. Res. 61, Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 84th Cong., 1st Sess. (1955)

After objections by the President, the Wensell memorandum was formally presented to the Subcommittee during the course of Wensell's testimony before that body. Hearings at 624. As it developed the memorandum was indeed relevant to the contracting procedure being investigated by the Senate. See United States v. Mississippi Valley Generating Co., 364 U. S. 520, 525-47 (1961) holding that Wensell, by consulting for the Bureau of the Budget while still remaining employed by First Boston Corp., had violated 18 U.S.C. § 434 (prohibition of conflict of interest).

In connection with another investigation of possible corruption in the executive branch, President Eisenhower's closest aide, Sherman Adams, testified before a subcommittee of the House Committee on Interstate and Foreign Commerce when that subcommittee uncovered evidence that Adams had accepted certain gifts from one Bernard Goldfine, including payment of hotel bills. Adams requested an opportunity to set the record straight, and in his testimony he discussed appropriate conversations with Executive officials. Hearing on Investigation of Regulatory Commissions and Agencies, Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., 3484-89; 3591-93; 3712-27. Adams subsequently resigned amid charges

\*/ Id. at p. III

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of political corruption and favoritism.

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THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES, et al

Plaintiffs

v.

RICHARD M. NIXON,  
individually and as President of the United States

Defendant

)  
)  
)  
)  
)  
)  
) Civil Action  
) No. 1593-73  
)  
)  
)  
)

AFFIDAVIT OF STEPHEN W. STATHIS

I, Stephen W. Stathis, being duly sworn, deposes and says:

1. I am an analyst in American History and American National Government, in the Government and General Research Division of Congressional Research Service, Library of Congress.

2. The attached document is a true copy of the Opinion of Attorney General Wirt, dated January 13, 1818.

3. The original handwritten manuscript of the Opinion may be found in the Records of the Office of Judge Advocate General (Navy), Record Group 125, National Archives Building.

Stephen W. Stathis  
Stephen W. Stathis

Subscribed and sworn to before me,  
this 28th day of August, 1973.

Rose Marie Gonschik  
Notary Public, D. C.

My Commission Expires

My Commission Expires July 14, 1977

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OPINION OF ATTORNEY GENERAL WILLIAM WERT,  
January 13, 1818

Is the President bound to attend a summons as a witness to a courts martial? What return should be made on such summons?

Washington, Jan. 13th 1818

Sir.

I recd this morning your communication of yesterday's date enclosing a summons from the judge advocate of a naval court martial to be held at Phila., tomorrow for the trial of Doct. Barton, addressed to the President of the U.S. and desiring his attendance as a witness at that court. The summons, you inform me is submitted for my opinion, that a return may be made such as is proper in this case.

A subpoena ad testificandum may I think be properly awarded to the President of the U.S. My reasons for this opinion are stated by the Chief Justice of the U.S. in the case of Aaron Burr--Burr's trial vol. 1. page 180 & seq. But if the presence of the chief magistrate be required at the seat of government by his official duties, I think those duties paramount to any claim which an individual can have upon him, and that his personal attendance on the court from which the summons proceeds ought to be, and must, of necessity, be dispensed with: my reasons for the latter opinion are stated by Mr. Jefferson, in a letter to the District attorney of Virginia, in the case before mentioned; Burr's trial 1. vol. page 255. As this a question of great delicacy and importance and one rather of constitutional than municipal law, I send the



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book itself, to which I have referred, for your perusal, and that of the President, which I earnestly invite to the subject that the step which may be taken in the case, may not be taken on my opinion only. I will add that in the trial of Smith & Ogden in New York, a similar summons issued for the head of departments; the answer of Mr. Madison and the other heads of departments to that summons, will be found in page six of the latter trial, which is also sent. In this case a motion was made for an attachment against the executive officers and the court was divided on the question of granting it. In Burr's case the opinion of the court was never called for on the question of attachment: so that the opinion of the federal court, so far as I am informed has never been expressed on their power to compel the attendance of the President or the officers of the executive departments, to give evidence. The power of compelling the attendance of the President as a witness being therefore, over the question one, as before remarked, wholly dependent, for its solution, on a sound construction of the constitution, and a question, withal, which may, by possibility, involve the executive in a collision with the judiciary, I am sure I shall stand excused for repeating the request that you, Sir, as well as the President, will yourselves consider the question, without resting on my opinion in a case which can scarcely be considered

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as exclusively within the province of the lawyer.

The return, however, which I would advise is this: if the process has been executed on the President in the usual form, by an officer or an individual, let the person serving it be instructed to make an endorsement like this -- "January 1818, executed on the President of the U.S. who stated that his official duties would not admit of his absence from the seat of government, but that he would hold himself ready, at all times, to state, in the form of a deposition, and facts, relevant to the prosecution, which were within his knowledge, and which might be called for by the court or the party." I would farther recommend, ere abundanti cautela, that this return should be accompanied by a respectful letter from the President to the Judge Advocate, taking the grounds presented by Mr. Jefferson, in the letter to which I have already referred you.-- If the process has not been served on the President in the usual form, but sent to him as a letter, I would recommend that he should endorse on it an admission of its service annexing to that admission a similar statement with that which I have before recommended in the case of it having been served; and enclosing the process, thus endorsed, in such a letter as I have advised.

It is clearly inferable from the argument of the Chief Justice, that he would require the excuse for non-attendance to be on oath, but I can scarcely think this necessary when the excuse is written on the face of the Constitution and founded on the fact that Mr. Monroe is the President

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of the U.S. and that Congress is now holding one of its regular sessions, during which his presence is so peculiarly necessary at the seat of government.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES, et al.,

v.

RICHARD M. NIXON.

Civil Action No. 1593-73 = FILE

MISC NO. 47-73

FILED ✓

AUG 30 1973

JAMES F. DAVEY, Clerk

ORDER

Upon consideration of the letter dated August 22, 1973,  
to the Court from Samuel Dash, Chief Counsel for plaintiffs Senate  
Select Committee on Presidential Campaign Activities, et al., filed  
herewith, which letter the Court will treat as a motion to consolidate  
the action herein with Misc. No. 47-73, In Re Grand Jury Subpoena  
Duces Tecum Issued to Richard M. Nixon, etc., and upon consideration  
of the letters in opposition dated August 23, 1973 and filed herewith,  
from Charles Alan Wright, Counsel for defendant Richard M. Nixon,  
and from Watergate Special Prosecutor Archibald Cox, it is by the  
Court this 30th day of August, 1973,

ORDERED that the motion to consolidate be, and the same  
hereby is, denied.

John F. Sirica  
Chief Judge

A TRUE COPY

JAMES F. DAVEY, Clerk

By James F. Capitanis  
Deputy Clerk

## THE WHITE HOUSE

WASHINGTON

September 4, 1973

Dear Judge Sirica:

We have filed today a motion requesting an extension of time within which to file a written response to the motion for summary judgment filed by the Senate Select Committee. We have requested an extension until September 24, 1973. Our need for this additional time is dictated partially by the fact that we have been informed that the Court of Appeals has decided informally that our appeal from your recent decision in Misc. No. 47-73 will be heard on September 11, 1973 and that any new briefs must be filed on or before September 10, 1973. We also will be given the opportunity to file a post-argument brief on or before September 14, 1973. Since this is not a formal decision by the Court of Appeals, we did not think it appropriate to make it a matter of public record in the motion.

Respectfully,

J. Fred Buzhardt  
Special Counsel to the President

The Honorable John J. Sirica  
United States Courthouse  
Third and Constitution Avenue, NW.  
Room 2428  
Washington, D. C. 20001

cc: Samuel Dash

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL )  
CAMPAIGN ACTIVITIES, et al, )

Plaintiffs )

v. )

Civil Action  
No. 1593-73

RICHARD M. NIXON, individually and as )  
President of the United States, )

Defendant )

MOTION FOR ENLARGEMENT OF TIME

Richard M. Nixon, pursuant to Rule 6(b), Federal Rules of Civil Procedure, respectfully moves this Court for an extension of time within which to respond to plaintiffs' motion for summary judgment until September 24, 1973, or such other time as the Court may designate, and as grounds therefor would show as follows:

1. That plaintiffs' motion for summary judgment was served on August 29, 1973 and under Local Rule 1-9(d), a written response is required on or before September 10, 1973;
2. That plaintiffs' motion for summary judgment apparently was prepared without reference to Richard M. Nixon's answer to plaintiffs' complaint, which directly challenges the jurisdictional allegations in plaintiffs' complaint;
3. That once challenged, plaintiffs have the burden of proof with regard to these jurisdictional allegations, and that to date they have failed to even address these issues;

4. That until jurisdiction has been established, this Court should refrain from substantive adjudication of the merits of this action, as requested by plaintiffs' motion for summary judgment;

5. That this request is filed within the period of time prescribed by Rule 6(b), Federal Rules of Civil Procedure, and that no previous requests have been made;

6. That an enlargement of time will promote a just and speedy adjudication of this action by permitting the parties, one of which is involved in an expedited review of a related case, to place the issues before this Court in an orderly manner.

WHEREFORE, Richard M. Nixon respectfully moves this Court for an extension of time to respond to plaintiffs' motion for summary judgment until September 24, 1973, or such other time as the Court deems appropriate.

Respectfully submitted,

LEONARD GARMENT  
J. FRED BUZHARDT  
CHARLES ALAN WRIGHT  
DOUGLAS M. PARKER  
ROBERT T. ANDREWS  
THOMAS P. MARINIS, JR.  
RICHARD A. HAUSER

Attorneys for the President

The White House  
Washington, D. C. 20500  
Telephone Number: 456-1414

By: \_\_\_\_\_

CERTIFICATE OF SERVICE

I, J. Fred Buzhardt, hereby certify that true copies of the attached Motion for Enlargement of Time and Memorandum of Points and Authorities were hand delivered on this \_\_\_\_\_ day of September 1973 to the office of

Samuel Dash  
Chief Counsel  
Senate Select Committee on  
Presidential Campaign  
Activities  
United States Senate  
Washington, D. C. 20510

---

J. Fred Buzhardt



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL )  
CAMPAIGN ACTIVITIES, et al., )

Plaintiffs )

v. )

Civil Action  
No. 1593-73

RICHARD M. NIXON, individually and as )  
President of the United States, )

Defendant )

ORDER

Upon motion of Richard M. Nixon, President of the United States,  
for enlargement of time, and for good cause shown, it is by this Court  
this \_\_\_\_\_ day of September, 1973,

ORDERED that said motion is granted; and it is

FURTHER ORDERED that Richard M. Nixon, shall have up to and  
including \_\_\_\_\_, 1973 within which to respond to plaintiffs'  
motion for summary judgment.

---

John J. Sirica  
Chief Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL )  
CAMPAIGN ACTIVITIES, et al, )

Plaintiffs )

v. )

Civil Action  
No. 1593-73

RICHARD M. NIXON, individually and as  
President of the United States, )

Defendant )

MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF MOTION FOR ENLARGEMENT  
OF TIME

Plaintiffs' motion for summary judgment was filed on August 29, 1973, and Local Rule 1-9(d) requires a written response on or before September 10, 1973. However, Rule 6(b), Federal Rules of Civil Procedure, vests this Court with discretionary authority to enlarge the period of time within which Richard M. Nixon must respond. Rule 6(b) provides, in pertinent part, as follows:

When by these rules... an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion... order the period enlarged if request therefor is made before the expiration of the period originally prescribed....

Filed as it was on the same day that Richard M. Nixon's answer was filed, the motion for summary judgment apparently was prepared without the benefit of that answer and the defenses that it raised. Thus the motion for summary judgment fails to address the jurisdictional defenses raised by the answer.

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Perhaps plaintiffs would suggest that the Court should decide the merits of this case before addressing the jurisdictional question. We submit that this would not only be inappropriate but an unfortunate burden on the Court.

It is fundamental that the threshold question in every case is whether the District Court has jurisdiction. Roberson v. Harris, 393 F.2d 123, 124 (8th Cir. 1968); Berkowitz v. Philadelphia Chewing Gum Corp., 303 F.2d 585, 588 (3d Cir. 1962); Underwood v. Maloney, 256 F.2d 334, 340 (3d Cir.), cert. denied 358 U.S. 864 (1958). The party invoking a court's jurisdiction has the affirmative duty to allege jurisdiction; and if the allegations are properly controverted, he has the burden of establishing such allegations. As put by the Court in McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1935):

There are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations, he has no standing. If he does make them, an inquiry into the existence of jurisdiction is obviously for the purpose of determining whether the facts support his allegations. In the nature of things, the authorized inquiry is primarily directed at the one who claims that the power of the court should be exerted in his behalf. As he is seeking relief, subject to this supervision, it follows that he must carry throughout the litigation the burden of showing that he is properly in court. The authority which the statute vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof.

See also Gibbs v. Buck, 307 U.S. 56 (1939); KVOS, INC. v. Associated Press, 299 U.S. 269 (1935).

The importance of these principles is underscored by the fact that courts have recognized their own duty to see that their jurisdiction is not exceeded. Thus the United States Supreme Court has frequently raised and decided jurisdictional questions on its own motion. See, e. g., Mitchell v. Maurer, 293 U.S. 237, 244 (1934); Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908).

By filing a motion for summary judgment, plaintiffs have asked the Court for an adjudication on the merits. This is premature, however, when plaintiffs' jurisdictional allegations have been controverted. Bell v. Hood, 327 U.S. 678, 682 (1946).

Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy.

See also Opelika Nursing Home, Inc. v. Richardson, 448 F. 2d 658, 667 (5th Cir. 1971). There the Fifth Circuit stated:

Federal jurisdiction is not so ambidextrous as to permit a district court to dismiss a suit for want of jurisdiction with one hand and to decide the merits with the other. A federal district court concluding lack of jurisdiction should apply its brakes, cease and desist the proceedings, and shun advisory opinions. To do otherwise would be in defiance of its jurisdictional fealty. Therefore, viewing Bell's a priori requirement of finding jurisdiction before rendering a final decision on the merits as one of the high commands of our jurisprudential system, we conclude that the court below, once it held that it had no jurisdiction, should have immediately dismissed the action.

We are not suggesting by this motion that the resolution of this case be delayed or prolonged. Rather we merely suggest that a just

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and speedy resolution of this action can only be achieved by a proper briefing on all issues raised by the pleadings. This cannot be accomplished within the time framework presented by Local Rule 1-9(d).

Respectfully submitted,

LEONARD GARMENT  
J. FRED BUZHARDT  
CHARLES ALAN WRIGHT  
DOUGLAS M. PARKER  
ROBERT T. ANDREWS  
THOMAS P. MARINIS, JR.  
RICHARD A. HAUSER

Attorneys for the President

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Telephone Number: 456-1414

By: \_\_\_\_\_

FILED SEP 5 1973

JAMES F. DAVEY  
CLERKIN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIASENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES, et al.Plaintiffs

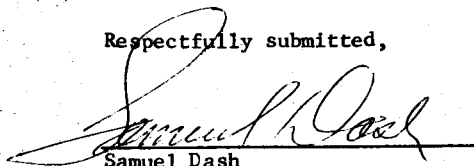
v.

RICHARD M. NIXON, individually and as  
President of the United StatesDefendantCivil Action  
No. 1593-73MOTION TO EXPEDITE ARGUMENT

Plaintiffs, by their undersigned counsel, hereby move the Court to set argument on plaintiffs' Motion for Summary Judgment on Wednesday, September 12, 1973. The grounds for this motion are set forth in the accompanying Memorandum in Support of

Plaintiffs' Motion to Expedite Argument and in Opposition to  
 Defendant President's Motion for Enlargement of Time.

Respectfully submitted,



Samuel Dash

Sherman Cohn  
 Eugene Gressman  
 Jerome A. Barron  
 Washington, D.C.  
 Of Counsel

Arthur S. Miller  
 Chief Consultant to  
 the Select Committee  
 Washington, D.C.  
 Of Counsel

Chief Counsel  
 Fred D. Thompson  
 Minority Counsel  
 Rufus Edmisten  
 Deputy Counsel  
 James Hamilton  
 Assistant Chief Counsel  
 Richard B. Stewart  
 Special Counsel  
 William T. Mayton  
 Assistant Counsel  
 Donald Burris  
 Assistant Counsel  
 Ronald D. Rotunda  
 Assistant Counsel  
 United States Senate  
 Washington, D.C. 20510  
 Tel. No. 225-0531  
 Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES, et al.

Plaintiffs

v.

RICHARD M. NIXON, individually and as  
President of the United States

Defendant

Civil Action  
No. 1593-73

ORDER

This matter having come before the Court on plaintiffs' Motion to Expedite Argument on their Motion for Summary Judgment, and the Court being of the opinion that the expedition motion should be granted, it is hereby this \_\_\_\_ day of September, 1973,

ORDERED that argument on Plaintiffs' Motion for Summary Judgment be and is expedited and set for September 12, 1973, at

\_\_\_\_\_  
John J. Sirica,  
Chief Judge, United States  
District Court for the District  
of Columbia



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES, et al.

Plaintiffs

v.

RICHARD M. NIXON, individually and as  
President of the United States

Defendant

Civil Action  
No. 1593-73

MEMORANDUM IN SUPPORT OF PLAINTIFFS'  
MOTION TO EXPEDITE ARGUMENT AND IN  
OPPOSITION TO DEFENDANT PRESIDENT'S  
MOTION FOR ENLARGEMENT OF TIME

The present action seeks Court determination of plaintiffs' right to access to certain tapes and other materials subpoenaed from defendant President. On August 29, the defendant President filed an Answer to the Complaint pursuant to an expedited schedule. On the same day plaintiffs filed a Motion for Summary Judgment with supporting papers. Presently there are two motions before the Court relating to the timing of this litigation. The defendant President seeks an enlargement of time to September 24 to answer plaintiffs' Motion for Summary Judgment. Plaintiffs, however, request expeditious argument of this motion and urge that Wednesday, September 12, be designated as the hearing date.

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The need for expedition of this cause is urgent,<sup>\*/</sup>for there is a compelling public interest in the speedy completion of the Committee's investigation. The Committee is required by S. Res. 60 to file with the Senate a final report on its investigations by February 28, 1974. Accordingly, the Committee would prefer to finish its hearings by the Congressional adjournment, which is now scheduled for October 15, 1973. While it is likely that the Committee hearings may extend beyond that date, there is every indication that its hearings must be completed by some time in November in order to permit adequate time for accomplishing the burdensome task of preparing a final report. If the materials subpoenaed are to be fully useable by the Committee, they must be in hand and digested considerably in advance of the hearings' termination. As we have pointed out in our Memorandum in Support of Motion for Summary Judgment (pp.15-17) the materials subpoenaed would be of vital importance to the Committee in resolving major conflicts in testimony and making key findings.

The Committee's need for expedition is thus equal to or even greater than that of the Special Prosecutor. The Special Prosecutor, in arguing that his case should be decided promptly by this Court and that his case and our case should not be

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<sup>\*/</sup>From the beginning plaintiffs have sought expedition of this matter. The Complaint, Para. 25, stated that "The public interest in, and need for, the swift completion of the functions of the Select Committee and the unique and critical Constitutional considerations raised by the actions of the defendant President warrant expedition of this action at all stages and prompt resolution of the dispute." With the Complaint, plaintiffs filed a motion to shorten the time for answer or other response to 20 days and counsel for defendant President stipulated to this accelerated schedule. Moreover, in a letter to the Court dated August 22 from Samuel Dash, Chief Counsel, plaintiffs stated that they would be prepared to file all necessary briefs regarding the summary judgment motion and be ready for argument thereon by September 7, 1973.

Page 3

simultaneously determined, relied heavily on the fact that the current Watergate Grand Jury's term expires in December 1973 and that consequently the subpoenaed tapes were needed before that date.<sup>\*/</sup> The Committee's effective deadline, as we have just observed, is even earlier -- in November.

There is another significant reason why expedition is important to plaintiffs. The Special Prosecutor's suit, which is, in the words of the President's counsel, "a related case"<sup>\*\*/</sup>, and whose ultimate resolution may as a practical matter substantially affect plaintiffs' rights, is well on the way to the Supreme Court. We are strongly of the view that the Supreme Court should hear and decide these two cases, which raise similar issues of great national import, at the same time. The interest of the Senate of the United States in these issues is at least equal in dignity to that of the Special Prosecutor, and plaintiffs should accordingly be allowed to participate in briefing and argument at the Supreme Court level as a party in order fully to present their views on those critical issues. A prompt decision by this Court on plaintiffs' action is therefore essential.

While we appreciate the fact that the President's counsel are engaged in the litigation brought by the Special Prosecutor, which apparently will be expedited on appeal, we feel that the existence of that case provides no excuse for failing to move expeditiously in the one at bar. Surely the President has ample legal resources at his command; it has, moreover, been obvious

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<sup>\*/</sup>See letter from Archibald Cox to Judge Sirica, August 23, 1973.

<sup>\*\*/</sup>Motion for Enlargement of Time, Para. 6.

Page 4

from the beginning that plaintiffs in this suit would seek expedition. It would be a grave disservice to the Committee and to the Senate of the United States if delay by counsel for defendant President were permitted to deprive plaintiffs of a timely ruling on this suit. We see no reason why defendant President should not be able to muster adequate legal assistance to respond to our Motion for Summary Judgment, raising all jurisdictional issues counsel desire, and to be ready for oral argument on September 12, the date requested in our Motion. We note that, both in our case and in the Special Prosecutor's case, the President's counsel have demonstrated the capacity to move with expedition.<sup>\*/</sup> They experienced no difficulty in meeting the accelerated schedule set by this Court in the Special Prosecutor's case.

We readily acknowledge that there are jurisdictional issues raised by the Answer that the Court must resolve before it can enter a favorable order in response to our motion for Summary Judgment. However, it is completely clear that the jurisdictional issues and those on the merits can be heard and considered by the Court at the same time; a two-step process, where a hearing is first had on jurisdiction and a decision rendered on that issue and then issues on the merits are heard and decided, is not necessary or even appropriate under the Federal Rule 56.

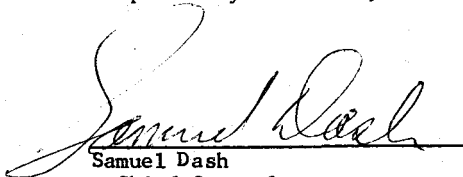
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<sup>\*/</sup>We must quarrel with counsel's assertion that they are not suggesting by their motion "that the resolution of this case be delayed or prolonged." If their schedule is followed, this case will not be heard for at least two weeks after the date we have proposed, a delay which, in the present circumstances, would be severely disadvantageous to plaintiffs.

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We will be prepared on Monday, September 10, 1973, to file a supplemental memorandum that fully establishes the jurisdictional bases on which this action rests and that addresses any other issues raised by the defendant President's Answer not dealt with in the Memorandum In Support Of Motion For Summary Judgment already filed. We see no reason why the President's counsel, since they have raised jurisdictional issues in their Answer and thus must be conversant with their arguments in those regards, cannot likewise file a memorandum on that date setting forth their jurisdictional contentions, together with their arguments on the merits, which they have already extensively treated in the context of the Special Prosecutor's proceeding. If this course is followed, briefing on all issues will be before the Court, a ruling on our Motion for Summary Judgment will not be "premature", and this Court can properly set argument for Wednesday, September 12, the date we request in our expediting motion.

Respectfully submitted,



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 Minority Counsel  
 Rufus Edmisten  
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 Of Counsel

Sept. 5, 1973

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL ]  
CAMPAIGN ACTIVITIES, et al. ]

v. ]

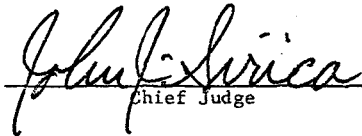
RICHARD M. NIXON ]

Civil Action No. 1593-73

ORDER

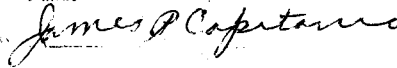
Upon consideration of the Motion to Expedite Argument  
filed by plaintiff Senate Select Committee on Presidential Campaign  
Activities, et al. on September 5, 1973, and the Court having heard  
oral argument, it is by the Court this 6th day of September,  
1973,

ORDERED that the Motion to Expedite be, and the same  
hereby is, denied.

  
Chief Judge

A T T O R N E Y

JAMES



FILED  
SEP 6 1973  
JAMES F. DAVEY, Clerk

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL )  
CAMPAIGN ACTIVITIES, et al., )

Plaintiffs )

v. )

Civil Action  
No. 1593-73

RICHARD M. NIXON, individually and as  
President of the United States, )

Defendant )

FILED  
SEP 6 1973  
JAMES F. DAVEY, Clerk

ORDER

Upon motion of Richard M. Nixon, President of the United States,  
for enlargement of time, and for good cause shown, it is by this Court  
this 6th day of September, 1973,

ORDERED that said motion is granted; and it is

FURTHER ORDERED that Richard M. Nixon, shall have up to and  
including Sept. 24th, 1973 within which to respond to plaintiffs'  
motion for summary judgment.

John J. Sirica

John J. Sirica  
Chief Judge

A TRUE COPY

JAMES F. DAVEY, Clerk,  
By James P. Capitanio  
Deputy Clerk

SAM J. ERYIN, JR., N.C.      IRMAN  
 HOWARD H. BAKER, JR., TEN      E CHAIRMAN  
 NORMAN E. TALMADGE, GA.      EDWARD J. GURNEY, FLA.  
 DANIEL K. INOUE, HAWAII      LOWELL P. WEICKER, JR., CONN.  
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 DEPUTY COUNSEL

## United States Senate

SELECT COMMITTEE ON  
 PRESIDENTIAL CAMPAIGN ACTIVITIES  
 (PURSUANT TO S. RES. 40, 90 CONGRESS)  
 WASHINGTON, D.C. 20510

September 18, 1973

The Honorable John J. Sirica  
 Chief Judge  
 U. S. District Court  
 for the District of Columbia

Re: Senate Select Committee on Presidential  
 Campaign Activities v. Richard M. Nixon  
 C. A. No. 1593-73

Dear Judge Sirica:

As your Honor is aware, the President's counsel will respond to our motions for summary judgment by September 24. In order that they, on that date, will be able to submit a brief on all the issues in this case and to facilitate the Court's consideration of these issues, plaintiffs are today filing a supplemental memorandum in support of our motions for summary judgment that deals with the jurisdictional and other technical issues raised by the President in his answer.

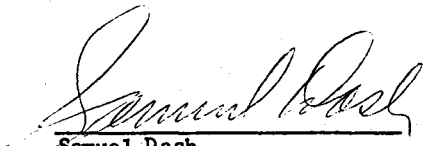
We hope that this early filing will allow your Honor to set a hearing date for our motion in the very near future and respectfully request that September 26 be designated for that purpose. If any additional written response is required to the papers filed by the President on September 24, we will submit such response before the hearing on the 26th, if that date is selected for the argument.



Judge Sirica

page two

We would emphasize again our very strong desire for expedition in this case so that the issues involved can be finally resolved while the Committee's hearings are still in progress.

  
Samuel Dash  
Chief Counsel

cc: Charles A. Wright

THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES, et al

Plaintiffs

v.

RICHARD M. NIXON,  
individually and as President of the United States

Defendant

FILED

SEP 18 1973

JAMES F. DAVEY  
CLERK

Civil Action  
No. 1593-73

SUPPLEMENTARY MEMORANDUM IN SUPPORT OF  
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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AFFIDAVIT OF SENATOR SAM J. ERVIN, JR.

Frankfurter, Hands Off the Investigation .

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES, et al.

Plaintiffs

v.

RICHARD M. NIXON, individually and as  
President of the United States

Defendant

Civil Action  
No. 1593-73

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF  
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This Court, by its decision in Misc. No. 47-73<sup>\*</sup>/ has effectively resolved many of the focal issues in the present case. Its rulings regarding the power of the Court to determine the executive privilege issue and to enforce its determinations against the President are particularly significant. Thus, the Court has held that the President does not enjoy an absolute discretionary power to withhold relevant evidence but that the final decision whether materials are protected by executive privilege rests with the Court, not the President. As the Court observed, "the laws of evidence do not excuse anyone because of the office he holds." (Op. p. 14). Moreover, the Court, separation of powers considerations notwithstanding, has affirmed its authority to direct the President to comply with a lawfully issued subpoena duces tecum, holding that the White House is not a sacrosanct "fourth branch of government", immune from all process. (Op. p. 10). Finally, the Court has

---

<sup>\*</sup>/In Re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon, or Any Subordinate Officer, Official or Employee with Custody or Control of Certain Documents or Objects.

established that there is no executive privilege to withhold evidence relating to executive criminality. The doctrine cannot be used "as a cloak for serious criminal wrongdoing." (Op. p. 19). "If the interest served by the privilege is abused or subverted, the claim of privilege fails." (Op. p. 20).

These rulings, while made in the context of the Special Prosecutor's case, are fully controlling here. If the Court, in the face of separation of powers considerations, may resolve an evidentiary dispute between the Grand Jury and the President, the Court may resolve a like dispute between the Senate and the President. If the Court has power to enforce the process of the Grand Jury, surely it is similarly empowered to enforce the Senate's process.

Moreover, if the Grand Jury is entitled to subpoenaed Presidential evidence relating to criminal wrongdoing, the Congress should enjoy at least an equal right to such evidence. As the Supreme Court asserted in United States v. Bryan, 339 U.S. 323, 331 (1950), the principle that "the public . . . has a right to every man's evidence" is just as applicable to legislative investigations as to judicial proceedings. The Committee, in fact, presents an even stronger case for the materials subpoenaed than does the Special Prosecutor. We submit that the public interest in determining the extent of malfeasance in the executive branch and the need for corrective legislation is of greater moment to the nation than the indictment and conviction of a few guilty individuals. <sup>\*/</sup> Furthermore, the Committee's request, unlike that of the Special Prosecutor, focuses on the President's own possible criminality. It is here that the President's claim of privilege is weakest; indeed, as shown <sup>\*\*/</sup> (Mem. p. 18), the President's own counsel has conceded that in such circumstance the doctrine of executive privilege is inapplicable.

<sup>\*/</sup>Moreover, where, as here, the President acts in contravention of the express will of Congress "his power is at its lowest ebb." Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). As demonstrated in Section II, this memorandum, it is absolutely clear that the Senate intended to authorize the Select Committee to subpoena documents from any executive officer, including the President.

<sup>\*\*/</sup> "Mem. p. \_\_\_\_" refers to the "Memorandum of Points and Authorities In Support of Motion for Summary Judgement" filed by the Select Committee on August 29, 1973.

For these reasons, we submit that the basic issues in this case have in substance been resolved by this Court's decision in Misc. No. 47-73. In Answer to our Complaint, the defendant President, perhaps in anticipation of the Court's adverse ruling in Misc. 47-73 and its application here, concentrated mainly on technical and jurisdictional objections to the present suit, rather than on the merits of this litigation. Although these objections are numerous, they dissipate when subjected to proper analysis. We show below that: (1) The Select Committee, in investigating corruption and criminality in high executive office, is fully within its constitutional prerogatives and in the best tradition of congressional investigations, (2) The Select Committee has ample authority to issue the subpoenas in question and to instigate and conduct this litigation, (3) The Committee has standing to bring this lawsuit, and several jurisdictional bases empower this Court to decide it.

I. Congress in The Discharge of Its Legislative Duties Is Empowered to Investigate Unlawful Conduct

The defendant President's claim that the Committee's inquiry constitutes an unconstitutional "criminal investigation and trial" (Answer, Sixth Defense) is utterly without merit. As we have shown (Mem. pp. 14-17), Congress, since the beginning of the nation, has investigated wrongdoing and maladministration by executive officials under its constitutional power to determine the need for new legislation and fulfill an associated "informing function." The Congress is not ousted of investigatory power simply because the executive conduct under scrutiny may be criminal and the defendant President's claim to the contrary has been repeatedly rejected by the Supreme Court.

In relevant respects the case at bar is a virtual duplicate of McGrain v. Daugherty, 273 U.S. 135 (1927). There the Supreme Court broadly sustained a Senate inquiry into alleged malfeasance and nonfeasance by Attorney General Daugherty in connection with the Teapot Dome scandal.\*/ The investigation was resisted on grounds essentially identical to those now asserted by defendant President. It was claimed that:

"The investigation is not legislative, but judicial in its character; it is an attempt to prosecute, try, and determine the guilt or innocence of Harry M. Daugherty. Congress has no such power except in impeachment proceedings." \*\*/

This assertion was flatly rejected by the Supreme Court, which upheld the validity of the investigation and ruled that:

(1)"/T/he power of inquiry--with process to enforce it--is an essential and appropriate auxiliary to the legislative function." 273 U.S. at 174.

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\*/ The Attorney General had also been charged with laxity in enforcing the antitrust laws. See 65 Cong. Rec. 3299, 3409 (1924).

\*\*/Argument for appellee, 71 L. Ed. 581. McGrain arose out of the issuance by the investigating committee of subpoenas to Mally S. Daugherty, the Attorney General's brother, to explore Mally Daugherty's possible involvement in alleged wrongdoing by his brother. On Mally Daugherty's failure to comply with the subpoenas, he was seized by the Senate Sergeant-at-Arms. He then, by way of habeas corpus, challenged the validity of his detention and, with it, the Senate's investigation. The Supreme Court upheld the validity of the investigation and detention.

(2) The Attorney General's administration of the Justice Department was "p/lainly a subject/ on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit." 273 U.S. at 177.\*/

(3) It was not "a valid objection to the investigation that it might possibly disclose crime or wrongdoing" by the Attorney General. 273 U.S. at 180.

What the Supreme Court said in McGrain regarding a legislative investigation is controlling here where the Congress, with a view to corrective legislation, is investigating alleged wrongdoing by high executive officials.

In Sinclair v. United States, 279 U.S. 263 (1929), the Supreme Court again rejected the claim that a Senate investigation of the Teapot Dome scandal was invalid because it dealt with allegedly unlawful conduct within the exclusive province of the judicial system. Congress had previously by Joint Resolution directed the President to institute appropriate civil and criminal court proceedings with respect to certain oil leases between Sinclair's company and the Interior Department. Sinclair asserted that this Resolution "had made the whole matter a judicial question which was determinable only in the Courts." 279 U.S. at 290. The Supreme Court repudiated this contention, stating that "i/t is plain that investigation of the matters involved . . . might directly aid in respect of legislative action." The Court continued:

" . . . It may be conceded that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits but the authority of that body, directly or through its committees, to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits." 279 U.S. at 295.

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\*/In response to the argument that the true motive behind the investigation was not to consider the need for new legislation but to pillory the Attorney General, the Court asserted that a presumption should be indulged that "the real object" of such an investigation was to aid Congress in its legislative function. 273 U.S. at 178. For later affirmations of this presumption, see Barenblatt v. United States, 360 U.S. 109, 133 (1959); Watkins v. United States, 354 U.S. 178, 200 (1967).



The teachings of McGrain and Sinclair have been reaffirmed by more recent decisions that have repeatedly sustained Congress' power to investigate unlawful conduct in connection with its legislative responsibilities. Hutcheson v. United States, 369 U.S. 599 (1962) (Senate Select Committee on Improper Activities in the Labor or Management Field; investigation of unlawful use of union funds to influence prosecution); Delaney v. United States, 199 F.2d 107 (1st Cir. 1952)(House Ways and Means Subcommittee on Administration of the Internal Revenue Laws; Investigation of Corruption by Collector of Internal Revenue); United States v. Costello, 198 F.2d 200 (2d Cir.), cert. denied, 344 U.S. 874 (1952) (Senate Special Committee to Investigate Organized Crime in Interstate Commerce); United States v. Orman, 207 F.2d 148 (3rd Cir. 1953) (same); Sanders v. McClellan, 150 U.S. App. D.C. 58, 463 F.2d 894 (1972) (Senate Government Operations Permanent Subcommittee on Investigations; investigation of riots and violent disorders)\*/

This consistent precedent is controlling here. Moreover, it is clear from a policy standpoint that criminal conduct is a legitimate subject of legislative concern because the existence of such conduct may well necessitate remedial legislation and public revelation of its scope.\*\*/ The need for legislative scrutiny is peculiarly acute where wrongdoing by executive officials is involved, for in such cases there is a serious danger that the

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\*/ The very existence of the "use immunity" statute for compelled testimony before Congress, which this Court construed in In Re: Application of United States Select Committee on Presidential Campaign Activities, (D.D.C., Misc. No. 70-73, June 12, 1973), recognizes that congressional investigations may deal with conduct which may also be the subject of criminal prosecution. And this Court's decision in that proceeding appears to assume the validity of the Select Committee's investigations into criminal conduct.

\*\*/ The subject of the Committee's investigation -- unlawful and improper activities by executive officials in connection with the 1972 presidential campaign -- is "p/ainly /a subject/ on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit." McGrain v. Daugherty, 273 U.S. 135, 177 (1927). This case is thus wholly unlike Kilbourn v. Thompson, 103 U.S. 168 (1881), where the Court found that the subject of inquiry -- the conduct of a particular real estate pool subject to then-pending bankruptcy proceedings -- could not lead to valid legislation.

corrective processes of criminal justice themselves will be corrupted or obstructed. That was precisely what occurred in Teapot Dome -- the laxity of Justice Department officials facilitated a "coverup" of criminal activities. The Senate's investigations -- which were fully sustained by the Supreme Court in McGrain and Sinclair -- laid bare the full extent of the wrongdoing and led to the appointment of a Special Prosecutor and the prosecution of the principal wrongdoers. <sup>\*/</sup>

The parallels to this case are obvious. Here, too, the evidence shows that certain highly-placed officials obstructed the work of the Justice Department and engaged in a "cover-up". It was through the efforts of the Committee, together with the work of this Court and of the media, that the extensive nature of the wrongdoing was first exposed and vigor restored to the system of criminal justice. In these circumstances, it is spurious in the extreme to claim that the Committee and its members "are not entitled to investigate criminal conduct" <sup>\*\*/</sup> and that all such investigations should have been left to executive discretion. <sup>\*\*\*/</sup>

If Teapot Dome and Watergate teach anything, it is "the danger to effective and honest conduct of the Government if the legislature's power to probe corruption in the executive branch is unduly hampered." Watkins v. United States, 354 U.S. 178, 194-95 (1957). In such cases, legislative inquiry is vitally important not only to consider the need for remedial measures but also to unstick the clogged wheels of the criminal justice system.

---

<sup>\*/</sup> Attached to this memorandum is an article published by Felix Frankfurter in the New Republic in May, 1924, in which he gives an overview of the congressional investigation of the Teapot Dome scandal and argues for the continuance of vigorous congressional inquiries into executive wrongdoing.

<sup>\*\*/</sup> Answer Para. 3; See also Sixth Defense.

<sup>\*\*\*/</sup> It is also anomalous, in our judgment, for the defendant President to suggest that Watergate matters must be left exclusively to the criminal justice system when he is, at the same time, refusing to give vital evidence to the Grand Jury.

II. The Committee has been Fully Authorized by the Senate to Subpena the Defendant President and to Institute Suit in Aid of its Subpena Power.

In his Answer, the defendant President asserts that the Committee was not authorized by the Senate to issue subpoenas to him (Seventh Defense). He also contends that the Committee, without Senate "review and action", was not empowered to instigate this litigation (Eighth Defense). We deal with these contentions in turn and demonstrate that each is without substance.

A. The Committee's Authority to Subpena the Defendant President.

In refusing to comply with the Committee's subpoenas, the defendant President at no point even suggested that the Committee lacked authority from the Senate to subpoena him; indeed, in resting his refusal on "the Constitutional principle of separation of powers,"<sup>\*/</sup> he impliedly conceded that the Committee was invested with the full power of the Senate in this respect. It was only many weeks later, after this litigation was initiated, that he belatedly claimed a lack of authority to issue the subpoenas. This claim is untimely, and has therefore been waived.<sup>\*\*/</sup> Assuming, arguendo, that it should be considered, it is untenable.

The Committee's authority was framed by the Senate in S. Res. 60 in sweeping terms that allow investigation of the President. The Committee is directed to investigate the extent to which "any persons" engaged in designated activities in "the presidential election of 1972, or in any related campaign . . . conducted by . . . any person seeking nomination or election

<sup>\*/</sup> Exhibit G to the Complaint, p. 2, incorporated by reference in Exhibit E to the Complaint. See also Exhibit F to the Complaint.

<sup>\*\*/</sup> The Supreme Court has repeatedly held that asserted defects in the power or authority of a congressional committee must be raised before the committee where possible; a person who refuses to furnish evidence to a committee on other grounds may not assert alleged defects in the committee's authority for the first time in subsequent litigation. *United States v. Bryan*, 339 U.S. 323 (1950); *United States v. Fleischman*, 339 U.S. 349 (1950); *McPhaul v. United States*, 364 U.S. 372 (1960). This rule, which was reaffirmed by the Court of Appeals for this circuit in *Shelton v. United States*, 131 U.S. App. D.C. 315, 404 F.2d 1292 (1968), controls here. Its purpose is plain. A person resisting a subpoena is not permitted to toy with a committee; he must raise before the committee any challenge to its authority so that it may have the opportunity to consider the objection or remedy itself. *McPhaul v. United States*, supra at 379.

as the candidate of any political party for the office of President of the United States in such election . . . " S. Res. 60, 93d Cong., 1st Sess. Sec. 1 (a). Since the defendant President is a "person" who sought "nomination" and "election" to the "office of President of the United States", the Committee is authorized to examine his conduct. This was made clear by Senator Ervin in the floor debates preceeding the adoption of S. Res. 60: "The Resolution" gives the Select Committee sufficient authority to investigate the presidential election of 1972 and any . . . activity of any person seeking nomination or election as a candidate . . . for the office of President . . . " 119 Cong. Rec. at S 2233 (1973) / Emphasis supplied /.

In aid of its investigatory powers, the Committee was also granted authority to "require by subpoena . . . any . . . officer . . . of the executive branch of the United States Government . . . to produce . . . any . . . communications, documents, papers . . . recordings, tapes, or materials relating to any of the matters or questions it is authorized to investigate and study." S. Res. 60, 93d Cong., 1st Sess. Sec. 3 (a) (5). <sup>\*/</sup> This grant includes authority to subpoena materials from the defendant President, for he is

\*/ The defendant President's contention (Answer, Ninth Defense) that the subpoena attached to the complaint as Exhibit D is "unreasonably broad and oppressive" is insubstantial. That subpoena seeks materials relating to the involvement of named individuals in alleged criminal acts related to the 1972 Presidential campaign and election. We would hope that the amount of such material would be comparatively limited and that the records relating to criminal conduct in the White House are not so numerous that it would be "oppressive" to gather them together. But should their number prove extensive, the subpoena is fully valid. In *McPhaul v. United States*, 364 U.S. 372, 382 (1960), the Supreme Court upheld a Congressional subpoena of similar scope stating that "a/ dequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes, and scope of the inquiry." Where, as here, the Committee's inquiry is "a relatively broad one," the permissible scope of materials that could reasonably be sought was necessarily equally broad. Id.

Moreover, because of the defendant President's failure to cooperate more fully with the Committee, the plaintiffs do not know precisely what materials in the possession or under the control of the defendant President might be relevant to the Committee's inquiry. In these circumstances, the subpoena is framed "with all of the particularity the nature of the inquiry and the /Committee's/ situation would permit." *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 210 n. 48 (1946); *McPhaul v. United States*, supra at 383.

obviously an "officer . . . of the executive branch of the United States Government." The presidency is an "office" of the government and is frequently spoken of as such.\*/ The Constitution itself repeatedly refers to the "Office of the President." U.S. Const. Art. II, sec. 1, clauses 1, 5, 7.

Any possible doubts whether the Senate intended to include the President as an "officer" subject to subpoena under Sec. 3-(a) (5) are laid to rest when S. Res. 60 is considered as a whole. As already shown, the Committee was authorized to investigate the defendant President's conduct, and it is logical to conclude that the Committee was likewise empowered to obtain relevant evidence from him. In addition, the Resolution specifically refers at the outset to "the office of President of the United States." Sec. 1 (a), and that phrase frequently reappears in the text of the Resolution.\*\*/ Since a congressional resolution, no less than a statute, must be considered in its entirety, the reference in Sec. 3 (a) (5) to "officer . . . of the United States" must be read in pari materia with the frequent references elsewhere in the Resolution to "office of President of the United States." Such a reading confirms the Senate's intent to authorize the Committee to subpoena the President, if necessary.\*\*\*/ Furthermore, S. Res. 60 was passed in an atmosphere of widespread public doubts regarding the possible involvement of the President

\*Counsel for the President themselves refer to the President as an "officer" of the United States. See, e.g., transcript of argument before this Court on August 22, 1973 in Misc. No. 47-73 at pp. 11, 17.

\*\*See the references to "office of President of the United States" in Secs. 2 (7), (9), (11).

\*\*\*Certainly congressional committees have successfully issued subpoenas to high executive officials in the past under subpoena authority framed in general terms. See, e.g., 3 Annals of Cong. 493, 1106 (1792) (investigation of St. Clair expedition under general authority to send for "persons, papers, and records;" "papers and accounts" furnished by Secretaries of Treasury and War, who also testified); H.R. Rep. 194, 24th Cong., 2d Sess.; Jrl. of Committee 75, 104 (1837) (Committee subpoenas issued to Secretary of Treasury, who complied); S. Res. 71, 77th Cong., 1st Sess. (1944), Hearings before Special Committee Investigating the National Defense Program, 78th Cong., 2d Sess., at 10505 et seq. ("Truman Committee" authorized to subpoena "witnesses" and "documents;" evidentiary subpoena issued to Attorney General and Secretary of Navy, who complied); P. L. 601, 79th Cong. § 134 (a) (1946) and Hearings before the Permanent Subcommittee on Investigations of Committee on Government Operations, 84th Cong., 1st Sess. at 43 et seq. (1955) (Committee authorized to subpoena "witnesses" and "correspondence"; subpoena issued to Harold Stassen, Administrator of Foreign Operations Administration, who complied) See generally 104 Cong. Rec. 3848-50 (1958) (remarks of Rep. Meader).

in "Watergate". This history gives further support to the contention that, with S. Res. 60, the Senate intended to give the Committee power to subpoena the President. \*/

B. The Committee's Authority to Institute this Litigation.

The Committee's authority to bring this litigation is fully established by a standing order of the Senate (Senate Resolution 262, 70th Cong., 1st Sess. (1928)) which provides in pertinent part:

That . . . any committee of the Senate is hereby authorized to bring suit. . . in any court of competent jurisdiction if the committee is of the opinion that the suit is necessary to the adequate performance of the powers vested in it or the duties imposed upon it by . . . resolution of the Senate . . . . Such suit may be brought and prosecuted to final determination irrespective of whether or not the Senate is in session at the time the suit is brought or thereafter. " \*\*/

This resolution was adopted by unanimous vote of the Senate in response to the Supreme Court's decision in Reed v. County Commissioners, 277 U.S. 376 (1928), which dismissed a civil action brought by a Senate committee to enforce a subpoena on the ground that the committee had not been explicitly authorized by the Senate to bring suit. As the legislative history of the resolution shows (see 69 Cong. Rec. 10596 (1928)), its purpose was to

\*/ The unusually broad nature of the Committee's powers was explicitly acknowledged in the debates preceding the adoption of S. Res. 60. For example, Senator Scott, the minority leader observed:

" . . . / S. Res. 60 / is the broadest resolution ever introduced in the Senate, in my recollection . . . "

" / It contains / the widest possible powers to send a hoard of officials amongst the executive department--if I can paraphrase the Declaration of Independence a little--to send a group of staff members . . . to look into all the raw files of the Government . . . . "

"This is a power never before given to anyone in the history of our Constitution. . . " 119 Cong. Rec. at § 2320 (1973)  
/ Emphasis supplied /

And Senator Cotton, a senior member of the minority party, declared:

"There must not be any suspicion allowed to go out to the American people that there has been any kind of a whitewash or any kind of a cover-up, no matter who may be involved, where they may be found, or how high they may be." 119 Cong. Rec. at S2323 (1973) / Emphasis supplied /

\*\*/ S. Res. 262 is found in the Senate Manual at § 77 and is attached to The Complaint as Exhibit B.

remedy the Reed defect and make clear that Senate committees are authorized to institute litigation.

Contrary to the assertion of defendant President, the Committee was not required to seek approval of the entire Senate before instigating the present suit. Certainly, such approval is not required by S. Res. 262;\*/ in fact, that resolution explicitly obviates the need for such approval by providing that "suit may be brought [by a committee] irrespective of whether or not the Senate is in session at the time the suit is brought." [Emphasis supplied] S. Res. 60 does empower the plaintiff Committee to "make to the Senate any recommendations it deems appropriate" with regard to refusals to obey its subpoenas, (see Sec. 3 (a) (6)), but this language simply gives the Committee the wholly discretionary option to make "recommendations" to the Senate\*\*/ and in no way qualifies the Committee's unrestricted authority under S. Res. 262 to institute litigation. Clearly, the Senate, through S. Res. 262, has delegated to the plaintiff Committee all of the authority which the entire Senate would have to institute the present litigation.

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\*/ The authority to sue granted by S. Res. 262 was successfully employed by the Senate Banking and Currency Committee without seeking full Senate approval in *In Re the Hearings by the Committee on Banking and Currency*, 245 F. 2d 667 (7th Cir. 1957).

\*\*/ For example, in view of the decision in *Wilson v. United States*, 125 U.S. App. D.C. 153, 369 F. 2d 198 (1966), it is possible that the Committee might want full Senate approval before contempt proceedings under 2 U.S.C. §192 are instituted. The Committee would also want Senate approval before the Senate Sergeant-at-Arms is sent to arrest someone who has refused to obey the Committee's process.

### III. This Court has Jurisdiction over the Subject Matter of the Suit.

The Complaint asserts five statutory and constitutional bases of jurisdiction for this suit -- 28 U.S.C. §1331, 28 U.S.C. §1345, 28 U.S.C. §1361, the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§701-706 and Article III of the Constitution. Each of these provisions affords a fully sufficient jurisdictional foundation. It is particularly clear that 28 U.S.C. §1331 is apposite here because the only objection to its application -- that the jurisdictional amount is not present -- is utterly without substance.

Before turning to these jurisdictional provisions, it is appropriate to deal summarily with defendant President's assertion that the Committee lacks standing to bring this action (Answer, Fifth Defense). A plaintiff has "standing" if he has a "personal stake" in the controversy before the Court. Sierra Club v. Morton, 405 U.S. 727, 732 (1972); Barlow v. Collins, 397 U.S. 159, 164 (1970); Baker v. Carr, 369 U.S. 186, 204 (1962). Here, the "personal stake" of the Committee and its members is their interest in (1) obtaining evidence necessary to the performance of their legislative and informing functions and (2) reaffirming their authority to issue subpoenas to all relevant officials. It has been repeatedly held that a legislator's stake in the discharge of his official responsibilities empowers him to bring suit to protect and further those responsibilities. Minnesota State Senate v. Beens, 406 U.S. 1 (1972); Coleman v. Miller, 307 U.S. 433, 438 (1939); Mitchell v. Laird, \_\_\_\_ U.S. App. D.C. \_\_\_\_, 476 F.2d 533 (March 20, 1973); Kennedy v. Sampson, (D.D.C., C.A. 1583-72, August 16, 1973); Holtzman v. Richardson, (E.D.N.Y., 73-C-537, July 25, 1973), rev'd on other grounds, \_\_\_\_ F.2d \_\_\_\_ (2d Cir. 1973); Williams v. Phillips, (D.D.C., C.A. 490-73, June 11, 1973). See also Trombetta v. State of Florida, 353 F. Supp. 575 (M. D. Fla. 1973).



These rulings are directly applicable here.\*/

A. 28 U.S.C. §1331 Affords Jurisdiction Because  
the Requisite Jurisdictional Amount is Present

Counsel for defendant President contend that federal question jurisdiction under 28 U.S.C. §1331 fails because the amount in controversy does not exceed \$10,000, exclusive of interest and costs. (Answer, Second Defense). There is no merit to this claim, as now demonstrated.

The Supreme Court has ruled that in determining whether a prospective litigant has satisfied the jurisdictional amount requirement, all doubts must be resolved in favor of the plaintiff:

" . . . /T/ he sum claimed by the plaintiff controls if the sum is apparently made in good faith. It must appear to a legal certainty that the claim is less than a jurisdictional amount to justify dismissal. "  
St. Paul Mercury Indemnity Co. v. Red Cab Co.  
303 U. S. 283, 288-89 (1938).

\*/ The decision by this Court in Williams v. Phillips is especially apposite. The plaintiffs, members of the Senate Labor and Public Welfare Committee, brought their action under 28 U.S.C. §1331, and alleged that the defendant was serving illegally as Acting Director of the Office of Economic Opportunity in that he had not been confirmed first by their Committee and later by the entire Senate. The Court, citing Mitchell v. Laird, supra, rejected the claim that the plaintiffs lacked standing to bring the action:

"In this case, a declaration that the defendant is unlawfully serving in office would bear upon the plaintiffs' duties to consider appropriations for OEO, or other legislative matters affecting OEO or the position of OEO Director. Moreover, the service by the defendant as Acting Director of OEO, rather than Director, does not remove the direct injury to plaintiffs' alleged right to pass on the individual nominated to be Director. The injury is aggravated if anything, because the Acting Director is performing the duties of the Director without the advice and consent which the plaintiffs would have been able to assert over an individual whose name had been submitted to the Senate for confirmation. "

See also United States Servicemen's Fund v. Eastland (D.C. Cir. No. 24,279 Aug. 30, 1973), a suit brought under §1331, where the Court held that a third party has standing to challenge a congressional subpoena directed at records relating to him. It follows from this decision that a congressional committee, as an immediate party in interest, would have standing to instigate litigation to enforce its own subpoenas.

"Mere difficulty of precise estimation of damages in monetary terms" or the fact that the damage amount may be somewhat speculative does not defeat jurisdiction. 1 Moore, Fed. Practice, Para. 0.92(5) at 845. See also Berk v. Laird, 429 F.2d 302, 306 (2d Cir. 1970); Columbia Motion Pictures Corp. v. Rogers, 81 F. Supp. 580 (S.D. Va. 1944). In an action where no damages are claimed, the amount in controversy is measured by the value of the right to be protected or the extent of the injury to be prevented." Marquez v. Hardin, 339 F. Supp. 1364, 1370 (N.D. Cal. 1969); Tatum v. Laird, 144 U.S. App. D.C. 72, 76, 444 F.2d 947, 951, rev'd on other grounds, 406 U.S. 1 (1972); Penn R.R. v. City of Girard, 210 F.2d 437, 439 (6th Cir. 1954). And where the plaintiff has asserted a violation of a constitutional right, "the better and modern view . . . is to give the jurisdictional allegations of the complaint a broad and liberal interpretation." Fifth Ave. Peace Parade Committee v. Hoover, 327 F. Supp. 238, 241-42 (S.D.N.Y. 1971). See also Tatum v. Laird, supra.; Berk v. Laird, supra.; Cortright v. Resor, 325 F. Supp. 791 (S.D.N.Y.), rev'd on other grounds, 447 F.2d 245 (2d Cir. 1971); United States Servicemen's Fund v. Eastland, \_\_\_ U.S. App. D.C. \_\_\_, \_\_\_ F.2d \_\_\_ (Civil No. 24,279 Aug. 30, 1973) slip op. at 16.

In the instant case, the jurisdictional amount requirement is met whether viewed from the perspective of (1) the out-of-pocket expenses that the Select Committee (and the public) will suffer if the two subpoenas are not honored, (2) the value of the constitutional rights and duties to investigate criminality and corruption in high government office and to propose corrective legislation that rest with the Select Committee and its members, or (3) the possible injury to defendant President if this suit is successful.

(1) Out-of-Pocket Expenses

The two subpoenas the President has rejected seek tape recordings of five significant conversations with John Dean and other documents and materials relating to the possible criminal involvement of twenty-five present and former White House officials. If the Committee is denied access to the vital materials it has subpoenaed, it must seek by other, more difficult, means, including additional investigations and the taking of additional testimony, the information that could be easily obtained if these materials were released. Furthermore, non-release of the tapes and other materials will make the Committee's report-writing and legislative recommendation functions much more taxing and expensive. The Committee, to fulfill its responsibilities under S. Res. 60, must reach some conclusions as to the involvement or noninvolvement of the President and other high officials in the criminality that tainted the 1972 campaign and election. This task would be greatly simplified if the subpoenaed tapes and materials were made available. But, if they are not, long hours must be spent by senators and staff alike sifting through the contradictory and inconsistent evidence on hand to reach some consensus. The non-availability of the subpoenaed materials may also prolong the public hearings because the best, most succinct evidence will not be available for presentation. In addition, without knowing the full extent of administrative corruption, the Committee will be disadvantaged and slowed in determining what corrective legislation to recommend to Congress.

The attached affidavit of Senator Sam J. Ervin, Jr., the Committee Chairman, shows that, in his judgment, the expenses to the Committee, including the costs of additional staff time for investigation, public hearings, report writing and legislative recommendation that will be necessitated if the subpoenaed tapes and other materials are not produced will exceed \$10,000. Moreover, the additional costs to the taxpayers and the nation for the extra time and effort the senatorial members of the Committee and

their individual staffs must spend in the event of non-production may well exceed \$10,000. Such costs afford a settled basis on which to rest a finding that the jurisdictional amount requirement of §1331 is satisfied. Petroleum Exploration Co. v. Public Service Comm'n, 304 U.S. 209 (1938); Bitterman v. Louisville & Nashville R.R., 208 U.S. 205, 224-25 (1907); Federated Mut. Implement & Hardware Ins. Co. v. Steinherder, 268 F.2d 734 (8th Cir. 1959). Surely, in light of the pecuniary damage described in Senator Ervin's affidavit, it does not appear "to a legal certainty" that plaintiffs have not satisfied this standard. St. Paul Mercury Indemnity Co. v. Red Cab Co., supra, at 288-89.

(2) The Value of Constitutional Rights and Duties  
of the Select Committee and its Members

As shown above, the Select Committee and its members have constitutional rights and duties to investigate criminality and corruption in high administrative places and to propose legislation to prevent future rot in the Presidential elective process. These constitutional rights and duties, which the present lawsuit seeks to protect and fulfill, are fully capable of valuation for jurisdictional amount purposes.

That constitutional rights can be valued for jurisdictional amount purposes was recently reaffirmed by the Court of Appeals for the Third Circuit in Spock v. David, 469 F.2d 1047, 1052 (3d Cir. 1972). There the Court expressly rejected the contention that the "rights of freedom of speech and assembly are of such a nature as not to be susceptible of valuation in money". See also Giles v. Harris, 189 U.S. 475, 485 (1902) (Holmes, J.) (held rights asserted by black voters alleging violations of their voting rights were, for jurisdictional amount purposes, "capable of estimation in money"); Wiley v. Sinkle, 179 U.S. 58, 65 (1900). And, as already noted, where an important constitutional issue is raised, the practice of federal courts is to construe the jurisdictional amount allegations so as to sustain jurisdiction,

particularly where to do otherwise would deny a forum for that issue. As one district judge observed:

"The better and modern view in cases where the complaint alleges abridgment of constitutional rights by federal officials is to give the jurisdictional allegations of the complaint a broad and liberal interpretation. Where, as here, plaintiffs have alleged activity which could tend to seriously inhibit their rights of assembly and petition, I am reluctant to conclude, upon a preliminary motion, that such rights are worth less than \$10,000 to plaintiffs. Certainly they may be difficult of evaluation, but 'priceless' does not necessarily mean 'worthless'."

Fifth Ave. Peace Parade Committee v.

Hoover, 327 F. Supp. 238, 241-42 (S. D. N. Y. 1971)

See also West End Neighborhood Corp. v. Stans, 312 F. Supp. 1066, 1068

(D. D. C. 1971); Murray v. Vaughn, 300 F. Supp. 688 (D. R. I. 1969).<sup>\*/</sup>

The value of the constitutional rights and duties here at issue is at least roughly measurable by reference to the sums appropriated for the Committee's work. The initial appropriation approved in S. Res. 60 was \$500,000; subsequently, on June 25, 1973, the Senate unanimously voted an additional \$500,000 for the Committee's work. 119 Cong. Rec. S11900 (1973). This Court has held that the jurisdictional amount requirement is met if the congressional appropriation for the activity at issue exceeds \$10,000,

Williams v. Phillips, \_\_\_\_ F. Supp. \_\_\_\_ (D. D. C. 1973, C. A. No. 490-73).<sup>\*\*/</sup>

<sup>\*/</sup> This approach to the valuation of constitutional rights is consonant with the purpose of the jurisdictional amount requirement - to keep petty litigation from burdening the federal courts. See S. Rep. No. 1830, 85th Cong., 2d Sess. 4(1958). Cases involving bona fide constitutional rights are hardly petty or trivial.

In Kennedy v. Sampson, and Holtzman v. Richardson, supra, p. 13, the district courts found that the value of the constitutional rights and duties of legislators satisfied the jurisdictional amount requirement.

<sup>\*\*/</sup> It is also appropriate to add that the rights and duties here involved are not the sole property of the Committee and its members. Rather, they belong in a very real way to the citizenry. The Committee and its members only hold these rights and responsibilities in trust for the public they represent, and the public is being grievously injured by the continued uncertainty, divisiveness and crisis in confidence that the President's failure to release the materials subpoenaed has produced. While it may be difficult to put this injury in monetary terms, surely the damage, by any accounting, exceeds \$10,000.

(3) The Value of this Cause to Defendant President

The value of a favorable determination to a defendant may be considered in determining whether the jurisdictional amount requirement is met. Williams v. Phillips, supra, Tatum v. Laird, supra. Most assuredly, the worth of a favorable decision to defendant President in this case far exceeds the sum of \$10, 000. The tapes and materials subpoenaed, because of the heightened public interest in them, are quite valuable. The depreciation in value that would occur if their contents were made public through compliance with the Committee's subpoenas would exceed \$10, 000.<sup>\*/</sup> We trust, moreover, that it is not untoward to suggest that the outcome of this litigation means far more to the defendant President than the depreciation in value of the tapes and records he now holds. If the accuracy of John Dean's account is substantiated in all particulars, the continuance of his Presidency may be in jeopardy and he may be subjected to criminal penalties. In these circumstances the outcome of this case is clearly worth more than \$10, 000 to defendant President. See Williams v. Phillips, supra.

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<sup>\*/</sup> The Supreme Court has held that, in appropriate circumstances, the value of an object in question in a lawsuit can be used in deciding whether the jurisdictional amount is present. Mississippi and Missouri R. Co. v. Ward, 67 U.S. 485 (1852).

B. Other Provisions Establish Additional Grounds of Jurisdiction Over This Suit

As demonstrated, there can be no doubt that 28 U.S.C. § 1331 gives this Court jurisdiction to consider the subject matter of this suit. Even if § 1331 were not available, however, jurisdiction would be fully sustainable under the other statutory and constitutional provisions asserted in the Complaint.

(1) 28 U.S.C. § 1345 and Article III of the Constitution

Under 28 U.S.C. § 1345, federal district courts are empowered to entertain "all civil actions, suits or proceedings commenced by the United States . . . ." While the right to sue in the name of the United States is most commonly exercised by the executive, the Houses of Congress share equal dignity under the Constitution and, as such, they are likewise entitled to bring suit on behalf of the United States under § 1345, where, as here, the national government is involved and that involvement is peculiarly the concern of the legislative branch. So much was implicitly suggested by the Supreme Court in Reed v. Commissioners, 277 U.S. 376 (1927), where a suit to enforce subpoenas brought by a Senate Committee under the predecessor to § 1345 was dismissed, but solely on the ground that the Senate had not delegated to the Committee its power to institute such a suit. As shown above, this delegational defect was rectified by the adoption of S. Res. 262, authorizing Senate committees, including the Committee here, to instigate suit in the performance of their duties in the name of and on behalf of the

United States. As a result of this delegation, the plaintiff Committee here has full authority to sue under § 1345. \*/

Since the passage of S. Res. 262, Senate committees on several occasions have resorted to the district courts in aid of their investigatory functions. In 1956 the Senate Banking Committee, seeking evidence from an imprisoned former bank president and invoking jurisdiction under § 1345, successfully applied through its own counsel to a District Court for a writ of habeas corpus ad testificandum to secure testimony from the prisoner. See In Re Hearings by the Committee on Banking and Currency, 245 F. 2d 667 (7th Cir. 1957) (prisoner's appeal held moot). The same Committee subsequently obtained an order from the District Court requiring the United States Attorney to release to it certain bank records compiled by the prisoner which he had withheld on grounds of grand jury secrecy. In Re Hearings by the Committee on Banking and Currency, 19 F.R.D. 410 (N.D. Ill. 1956).

Moreover, the Committee that appears as plaintiff in this lawsuit in several instances has successfully applied through its own counsel to this Court for

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\*/ There is no merit in defendant President's assertion, (Answer, Third Defense) that authorization by the Senate is insufficient, and that the plaintiff Committee must also receive approval from the House (in the guise of a statute) before instituting suit under § 1345. Each House of Congress has traditionally enjoyed independent power to issue and enforce its own process and punish contempts of its authority (e.g., McGrain v. Daugherty, 273 U.S. 135 (1927)), authorize monies to support its investigations (e.g., S. Res. 60, 93rd Cong., 1st Sess., authorizing funds for the Select Committee), and otherwise act independently in exercising its authority and vindicating its interests. There is thus no warrant to impose the novel requirement of approval from the other House when the action taken by one House to vindicate its interests takes the form of litigation to enforce a subpoena issued under the authority of that House. This principle was recognized by the Supreme Court in a state legislative context in Minnesota State Senate v. Beens, 406 U.S. 187 (1972), which held that a state Senate might participate in litigation involving federal questions without securing the concurrence of the House. The same principle applies at the federal level, where the independent power of each House to manage its own affairs has been accepted since the beginning of the nation. See also The Pocket Veto Case, 279 U.S. 655 (1929) (House committee represented before Supreme Court pursuant to committee resolution without approval of Senate); United States v. Lovett, 328 U.S. 303 (1943) and 89 Cong. Rec. 10882 (1943) (House committee authorized to appoint special counsel to represent United States in Court of Claims; no Senate approval); In Re Hearings by the Committee on Banking and Currency, 245 F. 2d 667 (7th Cir. 1957) where the Committee applied to the courts in connection with its investigation without securing the approval of the House. Since S. Res. 262 is simply a delegation to the Select Committee of the independent power that the Senate possesses to enforce its own process through litigation, the Select Committee has authority to appear here as the United States.



issuance of writs of habeas corpus ad testificandum. \*/ At no time has the Court's exercise of jurisdiction been questioned by either the Court or the parties. \*\*/

Indeed, both precedent and principle establish that, even without § 1345, the Court would have jurisdiction to entertain this suit under Article III of the Constitution. Under the equitable principles enunciated by the Supreme Court in In re Debs, 158 U.S. 564 (1895), and most recently applied in New York Times Co. v. United States, 403 U.S. 713 (1971), federal courts have power under that Article to hear suits brought by the federal government to protect the public interest "in respect to matters which by the constitution are entrusted to the care of the Nation." In re Debs, supra at 586. A statutory grant of jurisdiction for such cases is not necessary. \*\*\*/

\*/ See generally Misc. No. 70-73 (D.D.C. 1973).

\*\*/ As these decisions suggest, the Committee's appearance here by its own counsel is not precluded by 28 U.S.C. § 516, which limits representation of the United States to the Attorney General and his subordinates. As the history of that provision and the cases decided under it shows, it is a house-keeping statute designed to resolve conflicts between governmental agencies and to regulate the relationship between the Attorney General and the various United States Attorneys. See, e.g., FTC v. Guignon, 390 F. 2d 323 (8th Cir. 1968) (FTC enforcement of subpoenas); United States v. United States District Court for the Eastern District of Arkansas, 226 F. 2d 238 (8th Cir. 1955) (Attorney General's authority to overrule actions of United States Attorney). Plainly, 28 U.S.C. § 516, which is codified together with other provisions dealing with the internal administration of the Justice Department, was not intended to deal with representation of the legislative branch. As shown above, the Houses of Congress have appeared before the judicial branch by their own counsel and section 516 and its predecessors have not been construed to bar such representation. Moreover, even if 28 U.S.C. § 516 were generally applicable to representation of the legislative branch, it provides for an exception from its requirements in cases "otherwise provided by law." S. Res. 262 explicitly authorizes a committee to appear in the name of and on behalf of the United States by its own counsel and, in view of the independence traditionally exercised by each House of Congress in protecting its interests, this resolution would qualify as "law" for purposes of 28 U.S.C. § 516, and constitute sufficient authorization for the Committee's appearance by its own counsel. We also note that, in a matter such as this where the legislature is taking a position opposed to that of the President, it would be patently inappropriate for the Committee to be represented by the Attorney General or his subordinates.

\*\*\*/ District Judge Gerfein, in his opinion in New York Times, noted that the government was asserting its right "to protect itself in its vital functions" and stated: "There seems little doubt that the Government may ask a Federal District Court for injunctive relief even in the absence of a specific statute authorizing such relief." United States v. New York Times Co., 328 F. Supp. 324, 327 (S.C. N.Y. 1971).

In the Debs case, the federal government sought to enjoin a Pullman strike that threatened the national interest in the maintenance of interstate commerce and transportation of the mails. The Supreme Court held that the Federal Courts may entertain actions brought by the federal government:

" . . . whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the constitution are entrusted to the care of the Nation, and concerning which the Nation owes the duty to all the citizens of securing to them their common rights. . . ." 158 U.S. at 568.

Subsequent to Debs, the federal courts have recognized that the government, without utilizing a specific jurisdictional statute, may sue to protect a variety of national interests. E.g., New York Times v. United States, supra (constitutional authority of the President to protect military and diplomatic secrets); Sanitary District of Chicago v. United States, <sup>266 U.S. 405 (1925)</sup> ~~192 F. 2d 931 (1945)~~ (suit to remove obstructions to navigable waters); United States v. Arlington County, 326 F. 2d 929 (4th Cir. 1964) (protection of servicemen from improper state taxes); United States v. Brand Jewelers Inc., 318 F. Supp. 1293 (S.D.N.Y. 1970) (violation of due process rights of impecunious debtors by improper service of process); United States v. Brittain, 319 F. Supp. 1058 (N.D. Ala. 1970) (suit to enjoin enforcement of state miscegenation laws against military personnel).

In the instant case, the Committee is seeking to vindicate the national interest in the effective discharge of its constitutional responsibilities to investigate executive wrongdoing and consider remedial legislation.\*

While past cases to enforce vital governmental interests where the

\*/This interest is also protected by Congress' power to enforce its own process (see McGrain v. Daugherty, supra) and by 2 U.S.C. §192, providing for criminal punishment for disobeying congressional process. However, as shown in our initial memorandum, pp. 5-6, these remedies are inappropriate and inadequate in the special circumstance of this case. See further United States Servicemen's Fund v. Eastland, supra. The Supreme Court has stated that civil relief to vindicate a basic governmental interest is appropriate where statutory criminal sanctions "are inadequate to ensure its/full effectiveness." Wyandotte Transp. Co. v. United States, 389 U.S. 191, 202 (1967). See also p. 12, n.\*\*, supra.

Defendant President appears to agree that a contempt proceeding against him is an inappropriate means to resolve the critical issue of executive privilege. In his Petition for Writ of Mandamus to this Court of Appeals, (p.5, para. (c)) contends that this Court's ruling in Misc. No. 47-73 should be reviewed by way of mandamus because to require him "to refuse to comply with the order of August 29, 1973 and await further action, would be/ unnecessary and would only delay a resolution of this important and extraordinary case."

courts have recognized that a specific jurisdictional statute is not required have involved actions brought by the executive branch, their underlying principle fully sustains a like power allowing the Houses of Congress to sue to vindicate governmental interests which are, as here, the special concern of the legislative branch. The legislative branch is equal in constitutional dignity to the executive branch, and has equal right to invoke the Article III jurisdiction of the Federal Courts to promote and protect basic governmental interest.

(2) 28 U.S.C. § 1361

Under 28 U.S.C. § 1361, the federal district courts are invested with jurisdiction over "any action in the nature of mandamus to compel an officer . . . of the United States . . . to perform a duty owed to the plaintiff." The defendant President apparently concedes, as he must, that § 1361 affords an independent basis of subject matter jurisdiction.\*/ He contends, however, that the asserted duty involved here -- the duty of defendant President to respond to evidentiary subpoenas -- is not the sort of duty that "affords mandamus jurisdiction within the meaning of 28 U.S.C. § 1361." (Answer, Third Defense) But this contention is groundless and has already been rejected in substance by this Court's decision in the Special Prosecutor's case, as now explained.

The existence of jurisdiction under § 1361 depends on the nature of the duty which the defendant official assertedly owes the plaintiff. This section is applicable if the asserted duty is "ministerial" in character, and not "discretionary." E.g., Roberts, Treasurer v. United States, 176 U.S. 221, 231 (1900); Kendall v. United States ex rel. Stokes, 37 U.S. (12 Peters) 834, 839 (1838). This Court has already held that the duty of

\*See National Association of Government Employees v. White, 135 U.S. App. D. C. 290, 418 F. 2d 1126 (1969); Richardson v. United States, 465 F. 2d 844, 849-51 (3d Cir. 1972). Section 1361 represents a statutory codification and extension to all federal district courts of the common law power long enjoyed by this Court to issue mandatory relief against government officials. See Kendall v. United States ex rel. Stokes, 37 U.S. (12 Peters) 524 (1838); Byse and Fiocca, Section 1361 of the Mandamus and Venue Act of 1962, and Judicial Review of Federal Administrative Action, 81 Harv. L. Rev. 308 (1967). See further, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)

defendant President to respond to a lawful evidentiary subpoena is not "discretionary" but "ministerial":

"Discretionary duties and acts are not in issue here. The grand jury does not ask that the Court command or forbid the performance of any discretionary functions. The questions here concern the obligations of the President to provide evidence, something more akin to a ministerial duty if indeed it concerns official duties at all." In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon, Op. at 10, n. 21.

While the Court's ruling was in the context of a grand jury subpoena, the duty to respond to evidentiary subpoenas is not altered where the subpoena in question is issued by the legislature. As the Supreme Court pointed out in United States v. Bryan, 339 U.S. 323, 331-32 (1950), the principle that "the public . . . is entitled to every man's evidence" is just as applicable to legislative inquiries as to judicial proceedings. Moreover, "/i/ t is unquestionably the duty of all citizens to cooperate with Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to /congressional/ subpoenas." Watkins v. United States, 354 U.S. 178, 187 (1957). /Emphasis supplied./\*

Because the defendant President owes a legal duty to plaintiffs that is "ministerial" in character, the instant case is appropriate for the mandamus remedy and subject matter jurisdiction exists under 28 U.S.C. § 1361. \*\*/

\*/ The defendant President has asserted a privilege to disobey both grand jury and legislative subpoenas, but this assertion raises a question concerning the merits rather than the Court's jurisdiction to resolve the issue. Where the complaint alleges a non-frivolous claim of official duty, the Court should take jurisdiction under § 1361 and then determine whether the duty asserted is indeed owed to plaintiffs. Cf. Richardson v. United States, 465 F. 2d 844, 850 (3d Cir. 1972).

\*\*/ In addition, §1361 jurisdiction vests here under the established principle that where a federal officer violates the constitutional rights of a party, that party may bring a civil action under §1361 asserting the failure of the officer to fulfill a duty owed to that party. Cf. Natl. Assn. of Government Workers v. White, 135 U.S. App. D.C. 290, 293, 418 F.2d 1126, 1129 (1969); Kauffman v. Secretary of the Air Force, 135 U.S. App. D. C. 1, 4-5, 415 F. 2d 991, 994 (1969), cert. denied, 396 U. S. 1013 (1970). Here, as shown above, the Committee and its members have the constitutional right to investigate executive wrongdoing and consider remedial legislation, and, in that connection, to issue evidentiary subpoenas. See McGrain v. Daugherty, 273 U.S. 135 (1927). The asserted violation of this right by the President--whose duty to respect these rights is embodied in the constitutional admonition that he "take Care that the Laws be faithfully executed, "(U. S. Const., Art. II, sec. 3) -- furnishes an additional reason for jurisdiction under §1361. (fn. continued)

(3) The Administrative Procedure Act

Jurisdiction is also afforded by the provisions of the Administrative Procedure Act (APA) providing for judicial review of administrative action, 5 U.S.C. §§ 701-706. The defendant President challenges APA jurisdiction on the ground that plaintiffs "have not suffered any legal wrong nor . . . been adversely affected or aggrieved as the result of any agency action." (Answer, Third Defense). This contention is erroneous.

First, the President is an "agency" for purposes of the APA. This Court so held in Amalgamated Meat Cutters v. Conally, 337 F. Supp. 737, 761 (D.D.C. 1971) (three judge court) and we know of no authority to the contrary. As stated by Judge Leventhal in his opinion for the Court, the APA explicitly defines "Agency" for purposes of its jurisdictional provisions as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency," and specifically excludes from this definition the Congress, the federal courts, "the government of the territories or possession of the United States," "the government of the District of Columbia," and other bodies. The President is not excluded from the "agency" definition. The statutory "care taken to make express exclusion of 'Congress and the courts' " persuaded the Court in Amalgamated that inclusion of the President was intended in the sweeping definition of "agency."\*

See also Soucie v. David, 145 U.S. App. D.C. 174, 448 F. 2d 1067 (1971).

The basic premise of the Amalgamated Meat Cutters decision that the President's actions are subject to judicial review just like the actions

(continued from preceeding page)

The fact that plaintiffs at this juncture seek only declaratory relief does not preclude the Court's exercise of §1361 jurisdiction. Jurisdiction is established by a well-pleaded assertion of the defendant President's duty to plaintiffs. Once such a colorable claim for jurisdiction under §1361 has been made the Court has flexibility in granting relief, and may in appropriate circumstances issue only a declaratory judgment. See Burnett v. Tolson, 474 F.2d 877, 883 (4th Cir., 1973); 3 Davis, Admin. Law Treatise §23.09; Byse and Fiocca, *supra* at 319. Cf. Miguel v. McCarl, 291 U.S. 442 (1934); Houston v. Ormes, 253 U.S. 469 (1920); Richardson v. United States, 465 F. 2d at 855.

\*/ The Court in Amalgamated Meat Cutters also relied on the conclusion of leading commentators that the President is an "agency" for purposes of the APA, citing Davis, Administrative Arbitrariness: A Postscript, 114 U. of Pa L. Rev. 823, 832 (1966); Jaffee, The Right to Judicial Review, 71 Harv. L. Rev. 401, 769, 778, 781 (1958); Berger, Administrative Arbitrariness: A Synthesis, 78 Yale L. J. 965, 997 (1969).

of subordinate executive officials. This premise was strongly reinforced by this Court's decision in the Special Prosecutor's case, which held that the White House is not a "fourth branch of government" (Op. p. 10) and that presidential action is subject to judicial review.

Moreover, the Committee and its members fully satisfy the standing requirements of Section 702 of the APA, which provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Traditionally, a plaintiff has had to show that the defendant has violated plaintiff's asserted "legal right" in order to satisfy this provision. See Jaffee, Judicial Review of Administrative Action, p. 528 and cases discussed therein. Plaintiffs here have a legal right to issue subpoenas and secure their enforcement. See, e.g., McGrain v. Daugherty, supra, (1927); Watkins v. United States, supra, (1935); In Re Hearings by the Committee on Banking and Currency, supra, (19 F. R. D. at 410.) Since the plaintiffs assert that defendant President's refusal to obey their subpoenas is unlawful, and that their legal rights have therefore been violated, the requirements of §702 are fully met.<sup>\*/</sup>

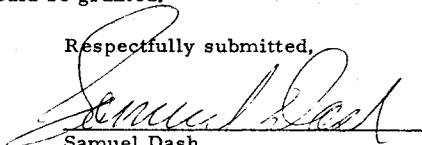
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<sup>\*/</sup> We note in passing that clearly the Committee and its members could establish standing within the meaning of section 702 under the more modern and less restrictive injury in fact standard. The plaintiffs have suffered "an injury to a cognizable interest" -- their constitutional investigatory and legislative rights-- and "the interest sought to be protected is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question". Association of Data Processing v. Camp, 397 U.S. 150, 153 (1970); See Sierra Club v. Morton, 405 U.S. 728, 734-35 (1972).

## CONCLUSION

As observed at the beginning of this memorandum, many of the basic issues in this case were, in substance, decided in plaintiffs' favor by this Court's decision in the Special Prosecutor's case. This memorandum has therefore dealt mainly with the technical and jurisdictional objections the defendant President has raised to avoid an adverse decision on the merits. We have shown that these objections are unfounded. The Committee has full power to investigate criminality in the executive realm, to issue subpoenas to all executive officials and to sue to enforce its process. This Court has several secure jurisdictional bases that permit it to hear this suit. Plaintiffs' motion for summary judgement should be granted.

Respectfully submitted,



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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES, et al.

Plaintiffs

v.

RICHARD M. NIXON, individually and as  
President of the United States

Defendant

Civil Action  
No. 1593-73

AFFIDAVIT OF SENATOR SAM J. ERVIN, JR.

Sam J. Ervin, Jr., being duly sworn, deposes and says:

(1) I am a member of the United States Senate and the Chairman of the Senate Select Committee on Presidential Campaign Activities. I make this affidavit in support of plaintiffs' claims in the above-captioned action that the jurisdictional amount requirements of 28 U.S.C. § 1331 are fully met.

(2) The defendant Richard M. Nixon, President of the United States, has refused to honor two subpoenas duces tecum submitted to him by the Select Committee that call for the production of evidence vital to the exercise of the Committee's functions. The two subpoenas seek certain tape recordings of conversations between the President and John Wesley Dean, III, and certain other materials and records, all of which relate to alleged criminal activities in connection with the Presidential campaign and election of 1972.

(3) As hereinafter explained, the out-of-pocket expenses to the Select Committee that will result from defendant President's failure to produce the materials subpoenaed will exceed \$10,000, exclusive of interest and costs. Moreover, as also explained, this failure to produce will impose



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additional costs on the public and taxpayers that will, standing alone, exceed \$10,000, exclusive of interests and costs.

(4) If the subpoenaed materials are not produced, the staff of the Committee, in order to meet its investigatory responsibilities, must attempt by other, more difficult means to reconstruct their contents. This task will demand extensive further investigation and interrogations. The defendant President's failure to produce also may well result in prolonging the public hearings because the best, most succinct evidence will not be available for presentation.

(5) If the five tape recordings of Dean-Presidential meetings are not made available, it will be necessary to interrogate others who may have heard these tapes to determine what they remember as to their contents. In public testimony, the Committee has established that at least one subordinate of the President (H. R. Galdeman) has listened to several of these tapes. Similarly, if the other materials and records called for are not produced, it will be necessary to interrogate numerous individuals who either (1) have had access to them and thus have knowledge of their contents, or (2) may have knowledge otherwise acquired of the alleged criminal activities to which the subpoenaed materials and records relate. It will also be necessary to serve additional subpoenas upon these individuals and to examine the records thereby produced.

(6) Certain of the materials and records subpoenaed relate to alleged criminal activities in the areas of political espionage and sabotage and campaign financing, which are now heavily under investigation by the Committee's staff and about which full hearings are yet to be had. For example, among the materials covered by the subpoenas are certain documents relating to the handling of the ITT affair, the existence of which is referred to in evidence already presented to the Committee. Production of these and other documents subpoenaed could greatly reduce investigatory time and effort and also diminish the number of days required for public hearings on espionage, sabotage and campaign contributions.

(7) The failure to produce the materials subpoenaed will necessitate considerable additional staff time and effort in fulfilling the Committee's report writing and legislation recommending functions. The Committee, under

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S. Res. 60, has been charged with the responsibility to inform the public of the full extent of criminality and corruption in high executive places during the course of the 1972 Presidential campaign and election. The staff's task in recommending conclusions to the Committee in this regard will be much more burdensome and time consuming if the materials subpoenaed are not produced. For example, with the Dean-Presidential tapes in hand, it would be much easier to determine the extent of Presidential involvement in the Watergate affair. Moreover, without a full awareness of the nature of the criminal conduct in the 1972 Presidential campaign and election and the identities of those that participated in it, the staff will be handicapped and slowed in formulating legislative recommendations to submit to the Committee.

(8) The Select Committee has been appropriated \$1,000,000 for its operations. The cost of recording and printing a single day's hearings is approximately \$700. Staff salaries per day amount to approximately \$4,500. It should be noted that the staff of the Committee is essentially employed on a temporary basis and that staff members will only be retained as long as their services are required. Travel and per diem costs for staff and witnesses are substantial and depend on the extent of investigation and public hearings required. Thus, if only several extra days of full staff time are spent in investigation, public hearings, report writing and legislative recommendations, the additional out-of-pocket costs to the Committee will exceed \$10,000. While it is not possible to estimate extra staff costs with complete precision, it is my best judgment that the increased staff costs necessitated by non-production of the subpoenaed materials will, in fact, exceed \$10,000.

(9) Additionally, if the subpoenaed materials are not made available, the members of the Committee and their staffs working on Watergate matters will have to spend many additional hours in investigatory activities, public hearings, writing reports and recommending legislation.

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The costs of this extra time and effort to the public and the taxpayers, standing alone, may well exceed the sum of \$10,000.

Sam J. Ervin Jr.

Sam J. Ervin, Jr.  
United States Senator

District of Columbia } ss

Subscribed and sworn to before me,  
this 17<sup>th</sup> day of September, 1973.

Peter L. Huber

Notary Public, D.C.  
My Commission expires

14 May 78

The New Republic, June 23, 1973

## Hands Off the Investigation

by Felix Frankfurter

*In May 1924, when he wrote the following article for The New Republic, Felix Frankfurter was a professor of law at Harvard. Senators Thomas Walsh and Burton K. Wheeler, both Democrats, were conducting hearings on bribery and other forms of illegal activity in the administration of President Harding, who had died just as the scandal was breaking, and been succeeded by his Vice President, Calvin Coolidge. The generic name for the Harding administration scandals came to be Teapot Dome, although a number of not necessarily connected scandals were actually involved. Sinclair and Doheny were oil men who were charged with obtaining leases on public lands through bribery. Harry Daugherty had been Harding's attorney general and was also charged with corruption. Criminal prosecutions were in the offing as these Senate hearings were being conducted. —THE EDITORS*

So grave were the first disclosures made by the Walsh and Wheeler investigations that the immediate response of the country was profound humiliation. Only the recently disavowed organ of the Republican

National Committee ventured brazenly to attack the exposers and minimize the exposure. But, as the effect of the impact of these disclosures wore off, partly because of the very extent of the revelations, public preoccupation with private worries and bewilderment over the variety of complicated issues were exploited by various powerful forces, from a variety of motives ranging from the lowest to moral confusion all with a view to discrediting investigation and arresting its further progress. The gathering forces against the investigations and the investigators reached their culminating reinforcement in the support of a President who, while professing a desire to vindicate the law, assumes that law and order are bounded by the Penal Code, and helped to create an atmosphere in which necessary investigation could not thrive.

Emboldened by the successful offensive against the pending investigations in Washington, various suggestions are afloat with a view to curbing future Walsh and Wheeler investigations. Professing, of course, that wrong-doing, impropriety and unwholesome

some standards in public life should be exposed, critics, who have nothing to say for the astounding corruption and corrupting soil that have been brought to light, seek to divert attention and shackle the future by suggesting restrictions in the procedure of future congressional investigations.

A proper judgment of the Walsh and Wheeler investigations involves a consideration of 1) the situation which confronted them, 2) their accomplishments, 3) their alleged abuses. Only after such consideration can we properly assess 4) the pertinence of any formal change in the procedure of congressional investigation.

1) *Situation confronting Walsh and Wheeler.* When the Harding administration began—in fact preceding it—the air was full of indications of the sinister influences that were to prevail and were prevailing in the conduct of some of the vital departments of the government. Around Fall and Daugherty suspicions steadily clustered. Washington was thick with talk, and not the talk of irresponsibles. As time went on the intimations became more and more outspoken; but every influence of authority, of powerful social connections, of the press, the whole milieu of officialdom in Washington was on the side of those in power and against disclosure and truth-telling. More than that, when things could no longer be stemmed and an investigation of Daugherty's administration was entered upon by a House Committee, the forces of wrong-doing rendered such an investigation abortive and futile, and thereby served to discredit further accusations and their investigation.

For nearly two years the efforts to uncover wrong-doing in the disposal of our public domain were hampered by every conceivable obstruction on the part of those in office and those influential out of office; involving members of the President's official entourage, and including perjury before a Senate committee on the part of one of the closest friends of the late President and one on close terms with the present Executive. The vast investigatorial agencies of the government not only failed to cooperate with the efforts to unearth wrong-doing; they positively sought to frustrate congressional activity.

Governmental machinery, prestige, wealth, agencies of publicity—all were for covering up things. No one who has not had some experience of the power the government can exert is able to realize the tremendous pressure against which Walsh and Wheeler were contending. Both the hostile resources and the inertia that they had to overcome were incredible. The odds that they thus encountered must be felt and not merely intellectually admitted and lightly dismissed.

2) *Accomplishments of Walsh and Wheeler.* These are beyond question: the bills filed by the government against the Sinclair and Doheny leases are based upon the findings of the Walsh committee, namely, corruption and conspiracy rendered possible through

Secretary Fall's corruption and Secretary Denby's guileless incompetence; the disgrace of, and pending grand jury inquiry into, a recent member of the Cabinet—Fall; the resignation of another member through incompetence—Denby; the dismissal of a third member—the attorney general—because of an enveloping, malodorous atmosphere.

It is safe to say that never in the history of this country have congressional investigations had to contend with such powerful odds, never have they so quickly revealed wrong-doing, incompetence and low public standards on such a wide scale, and never have such investigations resulted so effectively in compelling correction through the dismissal of derelict officials. All this, it must be remembered again and again, was done by Congress against obstructing executive departments and, to put it mildly, unassisted by a President, who, unlike Roosevelt, is not a crusader against wrong-doing.

3) *Alleged Abuses.* One would like to have a bill of particulars of these alleged abuses. Objection is frequently taken against irrelevant, unfair and unsubstantial charges and to the character of some of the witnesses. It is not easy to be patient with such an attitude. What were the irrelevant charges before the Walsh committee, and what were the improprieties in pursuing those charges? Certainly Senator Walsh has established all the charges surrounding the oil leases up to the hilt. Objections are made to the testimony centering around alleged pre-nomination and pre-election affairs in 1920. Surely it was relevant to ascertain whether interests were on the lookout to put into the Department of the Interior a man who, honestly or dishonestly, held one attitude rather than another toward our natural resources. Necessarily much of this was hearsay and gossip. Nevertheless there emerged definitely the fact that [Jake] Hamon [multimillionaire from Oklahoma] spent a huge sum of money for campaign purposes. If these aren't "leads" properly to be pursued, then we had better frankly admit that the power of congressional investigation is a sham, and not an effective instrument for ventilating issues.

What are the specific objections to be made against the hearings conducted by Senator Wheeler? Of course the character of the witnesses in many instances was disreputable. It is of the essence of the whole Daugherty affair that the attorney general of the United States was involved in questionable association with disreputable characters. It is naively suggested as to these individuals, that "they are not competent witnesses. But they are exhibits." It is difficult, at best, to get witnesses to talk. This criticism is familiar to everyone who has ever had anything to do with criminal prosecutions, namely, an attempt to divert attention from the misconduct of the defendant to the character of the witnesses against him. Of course the character of a witness is a relevant item. If by the

witnesses that Senator Wheeler produced he was able to furnish a "living demonstration of the atmosphere which prevailed in and around the Attorney General of the United States," how possibly could that conclusion have been demonstrated except in the way in which Senator Wheeler demonstrated it? Eminent lawyers might have done it a little differently—but the chances are very strong that they wouldn't have done it at all. It requires pertinacity and high indifference to the winds that blow to drive through the obstacles that faced Senator Wheeler. The performance of such a man in such a situation cannot be finely weighed, by a distant onlooker after the event, on an apothecary's scale.

4) *Revision of Procedure of Congressional Investigations.* Nothing in the experience of the Walsh and Wheeler investigations reveals the need of changing the process or confining the limits of congressional investigations. The proper scope and methods of procedure appropriate to congressional investigations depend on the conception of the part they play in enabling Congress to discharge its basic duties. This has been nowhere better expressed than by Woodrow Wilson in his *Congressional Government*:

It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function.

Undoubtedly the names of people who have done nothing criminal or wrong, or nothing even offending taste perhaps, have been mentioned in connection with these investigations. The question is not whether people's feelings here and there may be hurt, or names "dragged through the mud," as it is called. The real issue is whether the danger of abuses and the actual harm done are so clear and substantial that the grave risks of fettering free congressional inquiry are to be incurred by artificial and technical limitations upon inquiry. Any quantitative and qualitative judgment of what Walsh and Wheeler were up against, what they produced and how they produced it, leaves the experienced and disinterested mind, duly regardful of the investigating duties of Congress, wholly without justification for changing congressional procedure.

It must be remembered that our rules of evidence are but tools for ascertaining the truth, and that these tools vary with the nature of the issues and the nature of the tribunal seeking facts. Specifically the system

of rules of evidence used in trials before juries "are mainly aimed at guarding the jury from the overweening effect of certain kinds of evidence." That system, as pointed out by Wigmore, "is not applicable by historical precedent, or by sound practical policy" to "inquiries of fact determinable by administrative tribunals." Still less is it applicable to inquiries by congressional committees.

It must be remembered that in various fields there is no legal protection against harm due to unfettered speech. The only safeguards are those secured by social and moral pressure. Thus the immunities enjoyed by judges and legislators for anything said-by them as judges and as legislators are founded on deep experience. So also the abuses of the printing press are not sought to be corrected by legal restriction or censorship in advance because the remedy is worse than the disease. For the same reason congressional inquiry ought not to be fettered by advance rigidities, because in the light of experience there can be no reasonable doubt that such curtailment would make effective investigation almost impossible.

Our criminal procedure has been constantly under fire by the legal profession, from Chief Justice Taft down, because of its self-defeating technicalities. In a report to the American Bar Association, vigorous demand has recently been made for the liberalization of rules of evidence and procedure in criminal cases. Taken in connection with the proposal to curb the investigating powers of Congress, what is urged, in effect, is that we abandon the technical limitations that have been established to protect men from being sent to jail too readily, but introduce them into a field where they have never been resorted to and where they are wholly out of place, namely, in the exercise of the informing function of Congress.

A good deal must be left to the standards that Congress imposes upon itself and its committees; a good deal must be left to the duty of newspapers to report fairly and not sensationally, and to interpret wisely; a good deal must be left to the good sense of people.

In conclusion there is no substantial basis for criticism of the investigations conducted by Senator Walsh and Senator Wheeler. Whatever inconveniences may have resulted are inseparable incidents of an essential exertion of governmental power, and to talk about these incidents is to deflect attention from wrongdoing and its sources.

The procedure of congressional investigation should remain as it is. No limitations should be imposed by congressional legislation or standing rules. The power of investigation should be left untrammelled, and the methods and forms of each investigation should be left for determination of Congress and its committees as each situation arises. The safeguards against abuse and folly are to be looked for in the forces of responsibility that are operating from within Congress, and are generated from without.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL )  
CAMPAIGN ACTIVITIES, suing in its own )  
name and in the name of the UNITED )  
STATES, )

and )

SAM J. ERVIN, JR.; HOWARD H. BAKER, JR.; )  
HERMAN E. TALMADGE; DANIEL K. INOUE; )  
JOSEPH M. MONTOYA; EDWARD J. GURNEY; )  
and LOWELL P. WEICKER, JR., as United )  
States Senators who are members of )  
the Senate Select Committee on )  
Presidential Campaign Activities )

Civil Action No. 1593-73

Plaintiffs

v.

RICHARD M. NIXON, individually and as )  
President of the United States )

Defendant

BRIEF OF RICHARD M. NIXON  
IN OPPOSITION TO PLAINTIFFS' MOTION  
FOR SUMMARY JUDGMENT

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Civil Action No. 1593-73

Plaintiffs )  
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v. )  
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RICHARD M. NIXON, individually and as )  
President of the United States )  
)  
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Defendant )  
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BRIEF OF RICHARD M. NIXON  
IN OPPOSITION TO PLAINTIFFS' MOTION  
FOR SUMMARY JUDGMENT

This matter is before the Court on plaintiffs' Motion for Summary Judgment. As pointed out previously in the President's Motion for an Enlargement of Time to Respond, this Motion for Summary Judgment was filed within hours after the filing of the President's Answer to plaintiffs' Complaint and apparently without regard to certain of the allegations in that Answer upon which the plaintiffs have the burden. Subsequently, plaintiffs responded with a Supplemental Memorandum addressing these allegations. As a result, the matter is now ripe for adjudication. This Brief will deal with all the issues raised by the pleadings and by the plaintiffs in the order that we feel will be most helpful to the Court for resolution of this unprecedented and important matter.

### I. Introductory Statement

By their Motion for Summary Judgment, plaintiffs ask this Court to enter an order in the nature of a declaratory judgment pursuant to 28 U.S.C. § 2201 that two subpoenas duces tecum issued and served on the President must be complied with by him, notwithstanding the fact that the President has interposed a claim of privilege as to the materials covered by the subpoenas.

At the outset we should point out that the President does not question the right and duty of the Congress to conduct investigations and he does not seek to thwart the investigation of the Senate Select Committee by refusing to comply with the subpoenas in question. Nor does he object to the legitimate aspects of this particular investigation.<sup>1</sup> In his letter to the Chairman of the Committee on July 6, 1973, the President stated that he respected the responsibilities of the Committee and indicated that he was willing to cooperate with it within the bounds of the Constitutional rights and powers of the Presidency. There has in fact been considerable cooperation on behalf of the President in the Committee's investigation. All of this cooperation, however, has been voluntary and it is the view of the President that it should remain voluntary if our Constitutional traditions are to remain intact and inviolate.

This tradition has been well-described by Professor Corwin in his detailed analysis of the office of the Presidency.

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<sup>1</sup> See Part VI below.

In the many years that have rolled by since Jefferson's presidency there have been many hundreds of congressional investigations. But I know of no instance in which a head of a department has testified before a congressional committee in response to a subpoena or held in contempt for refusal to testify. All appearances by these high officials seem to have been voluntary.

Corwin, The President: Office and Powers 1787-1957

113 (4th rev. ed. 1957). He restates his view at page 116.

In short, no one questions, or can question, the constitutional right of the houses to inform themselves through committees of inquiry on subjects that fall within their legislative competence and to hold in contempt recalcitrant witnesses before such committees, and undoubtedly the question of employee loyalty is such a subject. On the other hand, this prerogative of Congress has always been regarded as limited by the right of the President to have his subordinates refuse to testify either in court or before a committee of Congress concerning matters of confidence between them and himself. Are, then, communications to the President or to officials authorized by him to receive them concerning the loyalty of federal executive personnel such matters of confidence? The question must undoubtedly be answered in the affirmative.

The Committee violated this time-honored tradition when it issued the subpoenas in the face of the President's full explanation on July 23, 1973, of the reasons why he had determined that it would not be in the public interest to disclose the information that the Committee had requested.

Now the Committee urges this Court to violate another time-honored Constitutional tradition -- that is, to hold that the President can be subjected to compulsory process by the Judiciary. Again, Professor Corwin's comments are appropriate. Subsequent to his discussion of Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803), he states:

In addition to his duty to the laws, a supplemental basis of the President's power to do this is the principle of his own immunity to judicial process.

Id. at 112. Corwin is referring to Attorney General Lincoln's objecting to answering certain questions, the answers to which would have involved disclosure of confidential information.

Despite the importance of these two grave issues, and despite the respective rights of the parties, this Court must first determine whether a civil action for declaratory judgment is the proper method for their resolution and whether the plaintiffs are properly in Court. By our submission, they are not.

Plaintiffs seek to invoke the jurisdiction of the Court by way of the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202. Before dealing with the specifics as to why they cannot make use of that Act, a few comments on its history may be helpful to the Court. Article III, § 2, of the Constitution allows a federal court to act only in cases and controversies. Prior to 1933, the Supreme Court had grave doubts about whether an action for a declaratory judgment was a "case or controversy" within the jurisdiction of the federal courts. See, e.g. Liberty Warehouse Co. v. Grannis, 273 U.S. 73 (1927); Willing v. Chicago Auditorium Association, 277 U.S. 274 (1928). In 1933, the Supreme Court resolved its doubts. Nashville, C. & St. L. Ry. Co. v. Wallace, 288 U.S. 249 (1933). This was followed immediately in 1934 by the adoption of the Declaratory Judgment Act, now 28 U.S.C. §§ 2201, 2202.

There are three things of importance to note with regard to the Act. First, and of critical importance in this matter, is that the Act and Civil Rule 57, which sets forth the procedures for its operation, are not jurisdictional. They are procedural only, Aetna Life Insurance Co. of Hartford, Connecticut v. Haworth, 300 U.S. 227, 240 (1937), and do not constitute an enlargement of the jurisdiction of the federal courts. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950). Thus there must be an independent basis for jurisdiction, under statutes equally applicable to actions for coercive relief, before a federal court may entertain a declaratory judgment action. See, e.g., Continental Bank and Trust Co. v. Martin, 303 F.2d 214 (D.C.Cir. 1962).

Second, it must be established that there is an "actual controversy" of a justiciable nature as both the Constitution and the statute require. The classic statement of the Constitutional and statutory requirement in this respect is by Chief Justice Hughes in Aetna Life Insurance Company of Hartford, Connecticut v. Haworth.

A "controversy" in this sense must be one that is appropriate for judicial determination. \* \* \* A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. \* \* \* The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. \* \* \* It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. \* \* \* Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the

rights of the litigants may not require the award of process or the payment of damages.  
 \* \* \* And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations that irreparable injury is threatened are not required.

300 U.S. at 240-241. Although the massive generalities of the Aetna case are quoted and requoted in later decisions, they are something less than a sure guide to decision.

"The considerations, while catholic, are not concrete."

McCahill v. Borough of Fox Chapel, 438 F.2d 213, 215 (3rd Cir. 1971). A better perception was stated for the Court by Justice Murphy in a later case.

The difference between an abstract question and a "controversy" contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941).

Finally, the Supreme Court has indicated a special reluctance to have important issues of public law -- and particularly those that are of Constitutional dimension -- resolved by declaratory judgments. "Caution is appropriate against the subtle tendency to decide public issues free from the safeguards of critical scrutiny of the facts, through use of a declaratory summary judgment." Eccles v. Peoples Bank of Lakewood Village, California, 333 U.S. 426, 434 (1948). See also Askew v. Hargrave, 401 U.S. 476 (1971); Public Service Commission of Utah v. Wycoff Co., 344 U.S. 237, 243 (1952); Dickson, Declaratory Remedies

and Constitutional Change, 24 Vand.L.Rev. 257, 286-287 (1971).

Viewed in the light of these three critical requirements, it will be demonstrated that plaintiffs' attempt to utilize the Declaratory Judgment Act to resolve this matter is misconceived.

## II. Jurisdiction Is A Threshold Question

It is fundamental that the threshold question in every case is whether the district court has jurisdiction.

Roberson v. Harris, 393 F.2d 123, 124 (8th Cir. 1968);

Berkowitz v. Philadelphia Chewing Gum Corp., 303 F.2d

585, 588 (3d Cir. 1962); Underwood v. Maloney, 256 F.2d

334, 340 (3d Cir.), cert. denied 358 U.S. 864 (1958).

The party invoking a court's jurisdiction has the

affirmative duty to allege jurisdiction; and if the

allegations are properly controverted, he has the burden

of establishing such allegations. As put by the Court in

McNutt v. General Motors Acceptance Corp., 298 U.S. 178,

189 (1936):

They are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing. If he does make them, an inquiry into the existence of jurisdiction is obviously for the purpose of determining whether the facts support his allegations. In the nature of things, the authorized inquiry is primarily directed to the one who claims that the power of the court should be exerted in his behalf. As he is seeking relief subject to this supervision, it follows that he must carry throughout the litigation the burden of showing that he is properly in court. The authority which the statute vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof.

See also Gibbs v. Buck, 307 U.S. 66 (1939); KVOS, Inc. v. Associated Press, 299 U.S. 269 (1936).

The importance of these principles is underscored by the fact that courts have recognized their own duty to see that their jurisdiction is not exceeded. Thus, the United States Supreme Court has frequently raised and decided jurisdictional questions on its own motion. See, e.g., Mitchell v. Maurer, 293 U.S. 237, 244 (1934); Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908).

By his Answer, the President has controverted each of the plaintiff's jurisdictional allegations. Thus controverted, the jurisdictional allegations become the primary questions before the Court. As was said in Bell v. Hood, 327 U.S. 678, 682 (1946):

Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the Court has assumed jurisdiction over the controversy.

See also Opelika Nursing Home, Inc. v. Richardson, 448 F.2d 658 (5th Cir. 1971). There the Fifth Circuit stated:

Federal jurisdiction is not so ambidextrous as to permit a district court to dismiss a suit for want of jurisdiction with one hand and to decide the merits with the other. A federal district court concluding lack of jurisdiction should apply its brakes, cease and desist the proceedings, and shun advisory opinions. To do otherwise would be in defiance of its jurisdictional fealty. Therefore, viewing Bell's a priori requirement of finding jurisdiction before rendering a final decision on the merits as one of the high commands of our jurisprudential system, we conclude that the court below, once it held that it had no jurisdiction, should have immediately dismissed the action.

448 F.2d at 667.

Before discussing the specific defects in plaintiff's statutory jurisdictional allegations, it is appropriate to dispose of their suggestion that they may invoke the jurisdiction of this Court directly under Article III,



§ 2 of the Constitution. (Supp. Memo. 22-24).<sup>2</sup> We call the Court's attention to the following statement in Powell v. McCormick, 395 U.S. 486, 512-513 (1969).

In Baker v. Carr\*\*\*we noted that a federal district court lacks jurisdiction over the subject matter (1) if the cause does not "arise under" the Federal Constitution, laws, or treaties (or fall within one of the other enumerated categories of Art. III); or (2) if it is not a "case or controversy" within the meaning of that phrase in Art. III; or (3) if the cause is not one described by any jurisdictional statute.

The Supreme Court in Powell had reference to the discussion of subject matter jurisdiction in Baker v. Carr, 369 U.S. 186, 198-199 (1962). This principle has been recently reaffirmed by the District of Columbia Circuit in United States Servicemen's Fund v. Eastland, \_\_\_\_ F.2d \_\_\_\_ (No. 24,279 August 30, 1973).

As the quotation from Powell indicates, entry into the federal court is like opening a safe deposit box, where two separate keys are required. For the federal courtroom door, the two essential keys are that the case be within the judicial power of the United States, as defined in Article III, § 2, of the Constitution, Hodgson v. Bowerbank, 5 Cranch (9 U.S.) 303 (1809), and that it be within a statutory grant of jurisdiction by the Congress, Cary v. Curtis, 3 How. (44 U.S.) 236, 245 (1845). See Wright, Federal Courts §§ 8, 10, (2d ed. 1970). In this case the plaintiffs lack either key. We shall discuss first the Constitutional barrier to jurisdiction over the case before pointing out why they are not within any of the statutory grants of jurisdiction.

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2 All of the cases to which plaintiffs refer for this proposition are cases brought by the United States. There is an independent statutory base for these cases in 28 U.S.C. § 1345. As we shall demonstrate, this is not a case brought by the United States because plaintiffs are not authorized to bring suit on behalf of the United States. See pp. 27-30 below.

III. This Matter Does Not Present A  
Justiciable Case or Controversy within  
the Meaning of Article III, § 2,  
of the Constitution

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In making the motion authorizing this suit, Senator Baker of Tennessee implored the Committee staff to place a justiciable issue before the courts. (S.Tr. 5502). We respectfully submit that they have failed to do so.

The suggestion that the proper manner to resolve the heretofore unresolved question of executive privilege as it applies to Congress by way of a declaratory judgment is not novel. See Berger, Executive Privilege v. Congressional Inquiry, 12 UCLA L. Rev. 1044, 1287-1289 (1965). The suggestion, however, flies in the face of the role of the courts in our Constitutional system of government. For this is, quite simply, a dispute between the Congress and the President, and to use the words of Justice Douglas, "federal courts do not sit as an ombudsman refereeing disputes between the other two branches." Gravel v. United States, 408 U.S. 606, 640 (1972) (Douglas, J. dissenting).

The concept of justiciability as it has evolved through our Constitutional history is well-described by the Supreme Court in Flast v. Cohen, 392 U. S. 83 (1968).

The jurisdiction of federal courts is defined and limited by Article III of the Constitution. In terms relevant to the question for decision in this case, the judicial power of federal courts is constitutionally restricted to "cases" and "controversies." As is so often the situation in constitutional adjudication, those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government. Embodied in the words "cases" and "controversies" are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary

in a tripartite allocation of power to answer that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine.

Justiciability is itself a concept of uncertain meaning and scope. Its reach is illustrated by the various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justiciable. Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action. Yet it remains true that "[j]usticiability is ...not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures..." Poe v. Ullman, 367 U.S. 497, 508 (1961)

392 U.S. at 94-95 (footnotes omitted).

This matter raises problems of justiciability, primarily because it calls for adjudication of a political question.

In Marbury v. Madison, 1 Cranch (5 U.S.) 137, 164-166 (1803), Chief Justice Marshall expressed the view that the courts will not entertain political questions even though such questions may involve actual controversies. This rule was found to have particular force with regard to the Office of President.

By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political: they respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.

1 Cranch at 165-166.

Since that early statement by Justice Marshall in Marbury v. Madison, the courts have struggled to establish criteria that would enable them to identify and uniformly deal with political questions. Such criteria have been evasive. In Coleman v. Miller, 307 U.S. 433, 454-55 (1939), the Court noted that a political question may be identified by evaluating "the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for judicial determination \* \* \*."

It was not until Baker v. Carr, 369 U.S. 186 (1962), however, that the Court finally succeeded in isolating and articulating a workable set of criteria for identifying an issue that presents a political question. The Court said:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U. S. at 217.

It is submitted that this matter, involving as it does a request by the Legislative Branch that this Court overrule a formal and legitimate invocation of executive privilege, poses a nonjusticiable political question of such magnitude that literally every single formulation or criterion established in Baker v. Carr is inextricably a part of the issue presented.

This matter involves a "textually demonstrable constitutional commitment of the issue to a coordinate branch." The doctrine of executive privilege has precisely identifiable constitutional sources. The power herein asserted by the President is conferred by the provisions of Article II, §§ 1, 2, and 3.

The § 1 grant of "executive power" solely to the President is the most obvious and demonstrable source for the heretofore unchallenged right of the President to invoke executive privilege whenever the President deems it appropriate. Such an exercise of executive power is entirely consistent with the unbroken tradition of executive independence from legislative and judicial interference. As the Court noted in Myers v. United States, 272 U.S. 52 (1926):

*common point in dispute - is whether the order is judicial*

Montesquieu's view that the maintenance of independence as between the legislative, executive and the Judicial branches was a security for the people had their [the Framers'] full approval\*\*\*. Accordingly the Constitution was so framed as to vest in the Congress all legislative powers therein granted, to vest in the President the executive power, and to vest in one Supreme Court and such inferior courts as Congress might establish, the judicial power. From this division on principle, the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires.

272 U.S. at 116.

That the President's right to invoke executive privilege is a unique and unreviewable exercise of the executive power is apparent when examined in the context of §§ 2 and 3.

The first paragraph of § 2 expressly grants to the President the right to require, in writing, the opinions of his principal executive officers on any subject. It

is this clear constitutional commitment to the President of the right to request and receive advice from his closest advisers which Justice Jackson characterized as an enumerated executive power that "would seem to be inherent in the Executive if anything is." Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 641 n. 9 (1952) (concurring opinion). Equally significant is the fact that this "inherent" power to seek and receive advice is among those grants of power in § 2 that is conferred on the President exclusive of any review by the Senate or House. In this respect, it is a Constitutional power as exclusive to the President as his untrammelled power to grant pardons. Ex parte Garland, 4 Wall. (71 U.S.) 333, 380 (1866). It furnishes the clear and compelling basis for the doctrine of executive privilege, a doctrine that not even the Senate Committee would deny exists.

What the Senate Committee does not comprehend, although obvious to the Founding Fathers, is that the power to seek and receive advice would be a useless and empty power if the President could not keep his own counsel, free from the review or scrutiny of the courts or the Congress. The very manner in which this inherent § 2 grant was made independent of Congressional interference bears witness to the intent of the Framers of the Constitution to preserve inviolate the confidentiality of the Executive Branch.

Whenever the essential confidentiality is threatened, as it is here, the Constitutional power to seek and receive advice becomes meaningless. That this clause granting to the President the power to require advice and opinions from his advisers would be meaningless without the contingent right to safeguard the confidentiality of those communications should be beyond dispute. As Justice Jackson

noted in his concurring opinion in Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952):

\* \* \* because the President does not enjoy unmentioned powers does not mean that the mentioned ones should be narrowed by a narrowly construction. Some clauses could be made almost unworkable, as well as immutable, by refusal to indulge some latitude of interpretation for changing times. I have heretofore, and do now, give to the enumerated powers the scope and elasticity afforded by what seem to be reasonable, practical implications instead of the rigidity dictated by doctrinaire textualism.

343 U.S. at 640.

Section 3 of Article II contains two further "textually demonstrable" commitments of the issue at stake in this case to the President. The President, by that section, is charged "from time to time [to] give to the Congress Information of the State of the Union \* \* \*." This vests in the President, not in the subpoena power of a Senate Committee, the power to determine when and what information he will provide to Congress.<sup>3</sup> The same section imposes on the President the duty to "take Care that the Laws be faithfully executed." As the President has clearly and forcefully maintained, the meetings and the conversations that the Senate Committee seeks to make public were participated in by the President pursuant to this Constitutional mandate. The performance of this executive duty cannot be brought under legal compulsion. Mississippi v. Johnson, 4 Wall. \*71 U.S.) 475 (1866).

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3 As former President Taft put it:

The President is required by the Constitution from time to time to give to Congress information on the state of the Union, and to recommend for its consideration such measures as he shall judge necessary and expedient, but this does not enable Congress or either House of Congress to elicit from him confidential information which he has acquired for the purpose of enabling him to discharge his constitutional duties, if he does not deem the disclosure of such information prudent or in the public interest.

Taft, Our Chief Magistrate and His Powers 129 (1916).

It is possible that any or all of these great powers may be abused, but for this the Constitution has provided its own remedy. As a unanimous Court, speaking through Chief Justice Taft, said of a similar power in Ex parte Grossman, 267 U.S. 87 (1925):

Our Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it \* \* \*.

Exceptional cases like this, if to be imagined at all, would suggest a resort to impeachment rather than to a narrow and strained construction of the general powers of the President.

267 U.S. at 121.

The Senate Committee in reality is asking this Court to substitute its judgment for that of the President in an area over which the President has exclusive and unreviewable power -- the invocation of executive privilege. Such a privilege, inherent as we have demonstrated in the Constitutional grant of executive power, is a matter for Presidential judgment alone. The standards and circumstances that mandate its use are a function of Presidential judgments. Such judgments cannot be second-guessed and overruled at the caprice of the Senate Committee. Nor can they be evaluated and reviewed by any discernible criteria traditionally utilized by the courts in resolving Constitutional disputes between individuals. The cases cited by the Committee in its Motion for Summary Judgment are not even remotely similar to the instant case, involving as they do controversies resolvable by judicial interpretation of a statute or the Constitution. Cf. Powell v. McCormick, 395 U.S. 486 (1969); United States v. Lovett, 328 U.S. 303 (1946); Humphrey's Executor v. United States, 295 U.S. 602 (1935). Thus by virtue of its request that the Court substitute its judgment for the President's, the Committee would force this Court to make "an initial policy determination of a kind clearly for nonjudicial discretion." This



is a compelling indicia of a political question articulated in Baker v. Carr.

Even if this Court could somehow acquire the perspective of the Executive Branch and its chief officer, which is the perspective from which an invocation of executive privilege is made, the separation of powers inherent in our Constitutional scheme would preclude any review of that initial policy decision. The President's reasons for invoking his privilege in this case have been explained clearly to the Senate Committee. Those reasons are firmly anchored in rights and duties exclusively Presidential. They are a direct function of the President's duties to preserve the atmosphere of confidentiality so essential to the proper performance of the Executive's decision-making powers and to safeguard from general disclosure matters of national security. It is submitted that in this former duty, just as in the area of the conduct of foreign relations, the President is "accountable in the exercise of (his) discretion only to the people of this country." Drinan v. Nixon, \_\_\_\_ F. Supp. \_\_\_\_ (Civil No. 73-1424-T, D. Mass., Aug. 8, 1973).

The matter of executive privilege, involving as it does subtle and exclusively Presidential judgments, is an area of decision-making where there are "considerations of policy, considerations of extreme magnitude, and certainly, entirely incompetent to the examination and decision of a court of justice." Ware v. Hylton, 3 Dall. (3 U.S.) 199, 260 (1796). It is this very "lack of judicially discoverable and manageable standards" for resolving the issue that further highlights the nonjusticiability of the question. It is respectfully submitted that this obvious absence of standards for review of the President's

invocation of privilege is apparent upon analysis of the Court's task in any in camera proceeding. As Professor Black so clearly explains,

The reason for maintenance of confidentiality may not, and sometimes will not, appear on the face of the submitted material but may lie in its context, outside the record. The President, in attempting to persuade the judge of the necessity for confidentiality, would thus often be forced to reveal more and more material beyond what had been subpoenaed, with no assurance that any of this material would remain confidential.

Black, Letter to the Editor, N.Y. Times, September 6, 1973, p. 34.

Thus the Court is asked to make an initial policy determination that the President has improperly or mistakenly invoked executive privilege. Such a determination by a court is Constitutionally impermissible and violates the most basic tenets of the separation of powers. Moreover it is a determination beyond judicial abilities since the Court simply cannot substitute its judgment for that of the President. The impossibility of judicial resolution is underscored by the ancillary problem of the absence of standards for resolving the question. The teachings of Baker v. Carr are clear and compelling and require recognition of these indicia of nonjusticiability.

In Powell v. McCormick, 395 U.S. 486, 548-549 (1969), the Court determined that it could resolve the question presented without creating "a potentially embarrassing confrontation between coordinate branches" of the government because the resolution of the question of Representative Powell's right to be seated in Congress required no more than that the Court exercise its traditional role as interpreter of the Constitution. The decision required an interpretation of Congressional powers under Article I, § 5, the type of interpretative function traditionally the

responsibility of the Judicial Branch. The instant case cannot be so easily resolved. Contrary to the facts in Powell, there is no dispute in this case as to the President's Constitutional power to invoke executive privilege. Many courts have so held and the Senate Committee itself recognizes the existence of an executive privilege. The Senate Committee, however, asks this Court to rule that the Legislative Branch has the responsibility and power to review the propriety of executive utilization of it. Such a legislative power does not exist, and for this Court to hold to the contrary would be the most patent expression of "lack of respect due a coordinate branch of government." Again, the teachings of Baker v. Carr obtain and the true nature of the political question presented is made manifest.

In Committee for Nuclear Responsibility, Inc. v. Seaborg 463 F.2d 788, 792 (D.C. Cir. 1971), a case upon which the Committee relies, the court clearly recognized that the government has an interest in avoiding disclosure of documents "which reflect intra-executive advisory opinions and recommendations whose confidentiality contributes substantially to the effectiveness of government decision-making processes." In Seaborg, the court considered only a claim of privilege by an "executive department or agency" and thus, despite the Committee's view that it controls here, Seaborg cannot be read as authoritative on the issue of a direct, personal claim of privilege by the Chief Executive.

What the Senate Committee requests here is for the Court to order the President to give up materials that the President claims are privileged. No court has ever done so. "The fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained." Mississippi v. Johnson, 4 Wall, (71 U.S.) 475, 500 (1866).

It is submitted that the question before this Court poses the dilemma inherent in any nonjusticiable political question. The Court is being asked to resolve a direct clash of power between two branches of government. To resolve the confrontation the Court must necessarily declare that one power is greater than its counterpart and thus violate the very essence of separation of powers among the co-equal branches. In this situation Mississippi v. Johnson is again instructive.

If the President refused obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government?

4 Wall. at 500-501. This case presents the same danger present in Mississippi v. Johnson, for if the Court denies the President's right to invoke executive privilege and orders production, there is no power to compel it. Nothing could more clearly demonstrate "lack of respect due a coordinate branch of government," and nothing could more explicitly demonstrate the nonjusticiable nature of the present matter.

The Presidential decision to invoke executive privilege is by definition a political decision. It is a function of the President's position as Chief Executive. It involves, as we have demonstrated, a complex blend of policy, perspective, and knowledge uniquely the province of the President and Executive Branch. Neither the courts nor Congress can vouchsafe themselves the elements of knowledge and perspective necessary to examine and review such a decision. If the exclusive executive power conferred upon the President in Article II is to remain a meaningful constitutional allocation, neither the court nor Congress can look behind this political decision already made by the President.

The Senate Committee invites this Court to create a Constitutional confrontation destructive of the separation of powers. It is submitted, with respect, that such an invitation must be declined. The atmosphere of Constitutional confrontation must be dissolved by this Court's "unquestioning adherence to the political decision already made." The unusual need for such adherence is further indicative of the nonjusticiable nature of the question presented.

Should this Court even consider issuance of the mandate requested by the Senate Committee, there should be an immediate recognition of its effect. If this Court declares in the instant controversy that Congress has the power to ask a court to review a direct, personal Presidential invocation of executive privilege, the trend is established for such declarations by all 400 district court judges. Baker v. Carr held that the potential for "embarrassment from multifarious pronouncements" on a single controversy is, in and of itself, reason for the judiciary to avoid resolution of a question and to declare that question nonjusticiable.

It is submitted that this Committee's challenge to the invocation of executive privilege is merely the first such challenge to executive power and confidentiality that will occur if this Court issues the judgment requested. For this reason, as well as existence of all the other indicia of a political question that adhere in this matter, the Court must hold the matter before it to be nonjusticiable.

#### IV. This Case Does Not Come Within Any Statutory Grant of Subject-Matter Jurisdiction

In paragraphs 6 to 9 of the Complaint, the Senate Committee seeks to invoke four different and wholly independent statutes as basis for jurisdiction of this case.

But there is no strength in numbers, and invocation of four inapplicable statutes does not redeem the failure to cite even one statute that does apply.

A. 28 U.S.C. § 1331

28 U.S.C. § 1331 grants to the district courts jurisdiction over all "civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." We agree that this is a "federal question" in the sense that, if it is justiciable at all, it does raise an issue of the respective rights of the President and Congress and of the power of the courts to mediate between them. We do, however, take issue with the bald assertion in paragraph 6 of the Complaint that the "matter in controversy" exceeds the sum of \$10,000, exclusive of costs, nor do we think that the failure to show how this is so in the Complaint has been remedied by the discussion in the Supplemental Memorandum or the Affidavit of Senator Ervin appended thereto.

From the earliest days of the Republic, the jurisdiction of the federal courts has depended, with regard to most classes of cases, upon a certain minimum amount in controversy. Since 1958, the amount has been \$10,000, exclusive of interest and costs. This is not a technicality, but a jurisdictional prerequisite. See United States v. Sayward, 160 U.S. 493, 497 (1895); Fishback v. Western Union Telegraph Co., 161 U.S. 96 (1896); Holt v. Indiana Manufacturing Co., 176 U.S. 68, 73 (1900). As stated in Giancana v. Johnson, 335 F.2d 366, 368 (7th Cir. 1964);

Courts may not treat as a mere technicality the jurisdictional amount essential to the "federal question" jurisdiction, even in this case where there is an allegedly unwarranted invasion of...privacy. The showing of that

essential is not a mere matter of form, but is a necessary element. Congress in § 1331 expressed the "federal question" jurisdiction in plain words. The district courts and suitors are bound by the words expressed. Congress could have withheld the jurisdiction entirely, as it did from 1789 to 1875. Or it could have given jurisdiction over suits arising "under the constitution, laws or treaties of the U.S." simply. But it limited the jurisdiction by including the element of the sum or value of the matter in controversy, and the congressional will is that unless that sum or value is shown there is no "federal question" presented and no jurisdiction.

The Fourth Circuit addressed this issue in McGaw v. Farrow,

472 F.2d 952, (4th Cir. 1973), stating:

The plaintiffs complain, however, that dismissal of their federal action on jurisdictional grounds will leave them remediless, since state courts are closed to them in actions against federal officials. \* \* \* But whether there is a state remedy or not provides no warrant for the courts to extend "federal question" jurisdiction beyond the limits fixed by Congress. The authority "to control lower federal court jurisdiction" is specifically vested in Congress under Article III of the Constitution. Accordingly, in determining the boundaries of "federal question" jurisdiction, courts must look to the Congressional enactment fixing that jurisdiction, not to the Constitution, remembering as Justice Frankfurter bluntly put it in Romero v. International Term. Co. (1959) 358 U.S. 354, 379, 79 S.Ct. 468, 484, 3 L.Ed.2d 368 that in such inquiry "[I]t is a statute, not a Constitution, we are expounding." Actually, from 1789 to 1875 federal courts exercised no "federal question" jurisdiction, and this was true whether there was a state remedy available or not, simply because there was no statutory authority for such jurisdiction. And when Congress did provide statutory authority for just jurisdiction, "...it limited the jurisdiction by including the element of the sum or value of the matter in controversy,..." and this limitation as to amount in controversy "is not a mere matter of form, but is a necessary element."

472 F.2d at 955 (footnotes omitted).

For jurisdiction to lie under 28 U.S.C. § 1331, the right or thing in controversy must be capable of valuation in monetary terms. As put by the court in Kheel v. Port of New York Authority, 457 F.2d 46, (2d Cir. 1972):

The federal courts cannot take cognizance under section 1331 of cases in which the rights are not capable of valuation in monetary terms. And the jurisdictional test is applicable to

that amount that flows directly and with a fair degree of probability from the litigation, not from collateral or speculative sources.

457 F.2d at 49.

The rule that a claim not measurable in dollars and cents fails to meet the jurisdictional test of amount in controversy was announced as early as Barry v. Mercein, 5 How. (46 U.S.) 103 (1847), and has been frequently reiterated and applied by lower courts, e.g., McGaw v. Farrow, 472 F.2d 952, 954 (4th Cir. 1973); Goldsmith v. Sutherland, 426 F.2d 1395, 1397 (6th Cir.), cert. denied 400 U.S. 960 (1970); Rapoport v. Rapoport, 416 F.2d 41, 43 (9th Cir. 1969), cert. denied 397 U.S. 915 (1970); 1 Moore, Federal Practice ¶ 0.92[5] (2d ed. 1960); 1 Barron & Holtzoff, Federal Practice and Procedure § 24, at 107-108 (Wright ed. 1960).

The suggestion, based on the affidavit of Senator Ervin, that hearing the tapes is worth more than \$10,000 to the Committee because, if it is denied access to them, it will cost the Committee more than \$10,000 to obtain the information it needs in other ways, is irrelevant in determining whether the requisite amount is in controversy, as the total inappropriateness of the only cases cited in that portion of the argument (Supp. Memo. 17) demonstrate. Those cases hold only that in a challenge to a regulatory statute or order the cost of complying with the statute or order is the amount in controversy, a proposition that no one would deny. But it is the "value of the object" of the suit that measures what it is in controversy, Mississippi & Missouri R. R. Co. v. Ward, 2 Black (67 U.S.) 485 (1862), and the object of this suit is production of the tapes. Plaintiffs have cited no case in which the cost of achieving the object by alternative means if the suit



fails has been regarded as the amount in controversy -- and they have not done so because there is no such case. Instead, the law is well settled that side effects of a decision, even when they clearly will result from stare decisis or collateral estoppel, will not be considered. E.g., Town of Elgin v. Marshall, 106 U.S. 578 (1882); Healy v. Ratta 292 U.S. 263 (1934).<sup>4</sup>

It is true that a divided panel of the Third Circuit, Spock v. David, 469 F.2d 1047 (3d Cir. 1972), and a very few district court cases (Supp. Memo. 18) have held that Constitutional rights are an exception to the principle that a claim not measurable in dollars fails to meet the statutory requirement -- and have apparently assumed that all Constitutional rights, or at least those based on the Constitutional provisions involved in those cases, are worth in excess of \$10,000. Much could be said for rewriting the statute to remove the amount in controversy requirement in cases in which Constitutional rights are asserted against federal officers, but Congress, though it has had legislation to this effect pending several times, has failed to do so.

4 For interesting recent applications of these rules, see Quinault Tribe of Indians v. Gallagher, 368 F.2d 648 (9th Cir. 1966) cert. denied 387 U.S. 907 (1967), and Kola v. Breier, 312 F. Supp. 19 (E.D. Wis. 1970). In the first of these cases the amount in controversy was held insufficient in a suit to prevent a state from asserting jurisdiction over an Indian reservation, even though if the plaintiff tribe lost the suit it would no longer get federal payments for law enforcement over the reservation. In the Kola case the court dismissed a suit for a declaration that a newspaper was not obscene, holding that it could not take into account the claim by the newspaper that, absent such a declaration, a state prosecution for obscenity would cause it to lose more than \$10,000 in advertising and sales.

The suggestion (Supp. Memo. 19) that the tapes have a monetary value to the President in excess of \$10,000 does not need to be dignified with a response.

The notion that it is for the courts to fill in a jurisdictional gap that they wish Congress had not created has been rejected by the majority of the courts. E.g., Goldsmith v. Sutherland, 426 F.2d 1395 (6th Cir.), cert. denied 400 U.S. 960 (1970). The Fourth Circuit, which had before it the opinion of the divided Third Circuit, expressly refused to follow it. It dismissed, for want of the requisite amount, a suit asserting First Amendment rights, and said: "Though a few decisions have held contrariwise, a like conclusion has been reached in a majority of the decisions of Circuit Courts of Appeals." McGaw v. Farrow, 472 F.2d 952, 954 (4th Cir. 1973). And it added the useful reminder that if this is indeed an unfortunate gap in federal jurisdiction, "it can only be filled in by Congress and not by judicial legislation." 472 F.2d at 955.

The Fourth Circuit is clearly right when it observes that the rule it applied is not only the majority rule -- indeed the almost-universal rule -- but that it seems to have been reaffirmed very recently by the Supreme Court in Lynch v. Household Finance Corp., 405 U.S. 538 (1972). Lynch held that personal rights as well as property rights may be enforced against state officials under 28 U.S.C. § 1343, which requires no amount in controversy, but it specifically noted that in suits against federal officials, which lie only under § 1331 rather than § 1343, "it is necessary to satisfy the amount-in-controversy requirement for federal jurisdiction." 405 U.S. at 547. See also Oestereich v. Selective Service System Local Board No. 11, 393 U.S. 233, 239 (1968).

Since the right asserted by the Senate here is not capable of being valued in money, this suit cannot lie under 28 U.S.C. § 1331.

B. 28 U.S.C. § 1345

Plaintiffs also seek to invoke jurisdiction under

28 U.S.C. § 1345. That statute provides:

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

In order for suit to be maintained under § 1345, plaintiffs must demonstrate that this suit was "commenced by the United States" or that it was commenced by an "agency or officer thereof expressly authorized to sue by Act of Congress." This plaintiffs have failed to do.

It is clear that this suit was not "commenced by the United States." The authority for conducting and supervising litigation in which the United States is a party, or is interested, is reserved to officers of the Department of Justice under the direction of the Attorney General, 28 U.S.C. § 516, and is specifically delegated to the United States Attorney for the district in which the action arose, 28 U.S.C. § 547(2). This requirement was recognized by the Supreme Court as early as 1868 in the Confiscation Cases, 7 Wall. (74 U.S.) 454, 457 (1868), where the court stated that the

settled rule is that those courts [district and circuit courts] will not recognize any suit, civil or criminal, as regularly before them, if prosecuted in the name and for the benefit of the United States, unless the same is represented by the district attorney\*\*\*.

Consequently, this suit, if maintainable at all under 28 U.S.C. § 1345, must be brought in the name of the United States and by the United States Attorney for the District of Columbia. Neither of these requirements have been met here.

Moreover, it is equally clear that this action was not commenced by an "agency or officer thereof expressly authorized to sue by Act of Congress." For purposes of § 1345, the term "agency" is defined in 28 U.S.C. § 451 to include

any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest\*\*\*.

It is instructive to note that in the 1948 revision of the Judicial Code, the Reviser's Note to § 1345 says, in part:

Word 'agency' was inserted in order that this section shall apply to actions by agencies of the Government and to conform with special acts authorizing such actions. (see definitive section 451 of this title.)

Thus, it was expressly contemplated that § 451 would control in interpreting § 1345. See also ALI, Study of the Division of Jurisdiction between State and Federal Courts, 256 (Off. Dr. 1969). "Agency" is also defined under the Administrative Procedure Act, 5 U.S.C. § 551(1)(a), and the Congress is specifically excluded from that definition.

The only arguable authority for maintaining this suit under § 1345 is S. Res. 262, 70th Cong. 1st Sess. (1928). That resolution provides in part:

any committee of the Senate is hereby authorized to bring suit on behalf of and in the name of the United States in any court of competent jurisdiction if the committee is of the opinion that the suit is necessary to the adequate performance of the powers invested in it or the duties imposed upon it by the Constitution, resolution of the Senate, or other law.

As plaintiffs note, this resolution was adopted because of the decision in Reed v. County Commissioners, 277 U.S. 376 (1928), which held that a resolution creating a special Senate Committee to investigate certain election activities

and conferring on it "all powers of procedure with respect to the subject matter" of the resolution did not give the committee authority to bring suit. 277 U.S. at 389. The plaintiffs in Reed had argued that jurisdiction existed under 28 U.S.C. § 41 (the predecessor of 28 U.S.C. § 1345) which provided that district courts had original jurisdiction "of all suits of a civil nature, at common law or in equity, brought by the United States, or by an officer thereof authorized by law to sue\*\*\*." After the plaintiffs' contention was rejected in Reed, the Senate sought to prevent such a result in the future by adopting Senate Resolution 262, which purports to authorize committees to bring suit.

Whether a Senate resolution could constitute sufficient authorization to sue is questionable under Reed, since that opinion contains dicta to the effect that the Senate acting alone may not be able to give that authority. 277 U.S. at 388. But any doubt that may have existed under the Reed holding was laid to rest by the enactment of 28 U.S.C. § 1345, which specifically requires express authorization by an Act of Congress.<sup>5</sup> In view of this more recent expression of legislative intent, it is clear that Senate Resolution 262 -- which is surely not an "Act of Congress" -- is insufficient.

The two cases cited by plaintiffs arising out of activities of the Committee on Banking and Currency

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5 Plaintiffs' construction of the President's Third Defense is in error. We do not suggest that the Senate must have permission of the House to sue. Rather our argument is that if the Senate, or one of its Committees, is permitted to institute a suit, it must find some statutory basis for jurisdiction, and this particular jurisdictional statute requires an "Act of Congress."

(Supp. Memo. 21) are not authority to the contrary since no jurisdictional issue was raised or noticed by the courts. And the cases for the proposition that the government may sue to protect a wide variety of national interests (Supp. Memo. 22-23) are wholly off point. Those cases go to the standing of the United States to assert claims of particular kinds. There was no problem of jurisdiction in any of them, since suit was by the United States, and jurisdiction was granted by § 1345 or its predecessor.

Simply stated, plaintiffs are not empowered by Act of Congress to sue and cannot invoke the jurisdiction of this Court under 28 U.S.C. § 1345.

C. 28 U.S.C. § 1361

Plaintiffs claim jurisdiction under 28 U.S.C. § 1361, which grants "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the President." In support of their jurisdictional allegation, plaintiffs allege in paragraph 19 of the Complaint that the President's refusal to produce the materials sought by the subpoenas was "in breach of his legal duty to respond to and to comply with such subpoenas." The Complaint is devoid of any other facts defining the nature of the duty allegedly owed the plaintiffs.

The purpose of 28 U.S.C. § 1361 was to facilitate review by federal courts of administrative actions, not to create new causes of action against the United States Government. 2 U.S. Code Cong. & Adm. News 2785 (1962). Thus for jurisdiction to lie under 28 U.S.C. § 1361, plaintiffs must demonstrate that the traditional criteria

for a mandamus proceeding have been satisfied.<sup>6</sup> McGaw v. Farrow, 472 F.2d 952, 956 (4th Cir. 1973). In Prarie Band of Potawatomie Tribe of Indians v. Udall, 355 F.2d 364, 367 (10th Cir.), cert. denied 385 U.S. 831 (1966), it was stated that

Before such a writ may issue, it must appear that the claim is clear and certain and the duty of the officer involved must be ministerial, plainly defined, and peremptory. Huddleston v. Dwyer, 10 Cir. 145 F.2d 311. The duty sought to be exercised must be a positive command and so plainly prescribed as to be free from doubt. Wilbur v. United States ex rel. Kadrie, 281 U.S. 206, 50 S.Ct. 320, 74 L.Ed 809.

See also McGaw v. Farrow, 472 F.2d 952, 956 (4th Cir. 1973); Jarrett v. Resor, 426 F.2d 213, 216 (9th Cir. 1970); United States v. Walker, 409 F.2d 477, 481 (9th Cir. 1969); Carter v. Seamans, 411 F.2d 767, 773 (5th Cir. 1969).

Plaintiffs admit, as they must, that for jurisdiction to lie under 28 U.S.C. § 1361, they must show that the President owes a ministerial duty to the Senate Select Committee to furnish the evidence in question (Supp. Memo. 24-25). In support of this proposition they place sole reliance on the holding in this Court in the related case that the President's duty to turn over evidence to a grand jury was ministerial in nature.

We would first point out that we disagree with this holding by the Court in the grand jury proceeding, which is presently on appeal. In addition, it will be demonstrated in Point VII that disclosure by the President to

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6 It is no mere happenstance that the statute uses the phrase "in the nature of mandamus." This language was added at the insistence of the Department of Justice, and finally agreed to by those who were pressing for the legislation only because they feared a veto if those words were deleted. See Jacoby, The Effect of Recent Changes in the Law of "Nonstatutory" Judicial Review, 53 Geo.L.J. 19, 21-23 (1964). Thus, the restriction of the statute to traditional concepts of mandamus was quite deliberate.

Congress is discretionary with the President, based on his view of what the public interest permits. The suggestion that he is under a ministerial duty, enforceable by mandamus, to disclose to Congress anything and everything a committee may demand is wholly without precedent in our history, and has been authoritatively refuted many times. Surely it cannot be contended that this imaginary duty is "so plainly prescribed as to be free from doubt."

The reliance on Watkins v. United States, 354 U.S. 178, 187 (1957), and United States v. Bryan, 339 U.S. 323, 331-332 (1950), is misplaced. (Supp. Memo. 2-7). These cases do not support the proposition that a Congressional committee has the status of a grand jury. In fact, Watkins clearly states that Congress is not a "law enforcement or trial agency."

D. 5 U.S.C. § 701

As their fourth and final basis for federal jurisdiction, plaintiffs rely upon the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq., claiming to have suffered a "legal wrong" as the result of Presidential action for which no adequate review proceeding is otherwise available. Section 702 of the Act provides that

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

"The terms used in this section are terms of art," Kansas City Power & Light Co. v. McKay, 225 F.2d 924, 932 (D.C. Cir.), cert. denied 350 U.S. 884 (1955) and since the essential elements of judicial review -- "agency action" and a "legal wrong" -- are lacking here, the plaintiffs are not entitled



to judicial review and their jurisdictional claim under the Administrative Procedure Act must fail.

Not even under the most contorted interpretation of the Administrative Procedure Act could the President's refusal to produce the items sought by the subpoenas be considered "agency action," the essence of which is adjudication and rule-making. Professor Davis has suggested that when the President, a governor, or a municipal governing body exercises a power of adjudication or rule-making, he or it is to that extent an administrative agency, 1 Davis, Administrative Law Treatise, § 1.01 at 1-2 (1958), but plaintiffs' reliance on Amalgamated Meat Cutters & Butcher Workmen v. Connally, 337 F.Supp. 737, 761 (D.D.C. 1971) for the proposition that the President is an "agency" under the facts of this case is clearly misplaced.<sup>7</sup> "Rule-making" means "agency process for formulating, amending, or repealing a rule" and "[a]djudication" means "agency process for the formulation of an order."<sup>8</sup> 5 U.S.C. § 551(5), (7). Plaintiffs have not alleged any conduct on the part of the President that would fall into either category; moreover, the definition of "agency action" -- "the whole or a part of an agency rule, order, license,

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7 The extravagant reading the Senate Committee gives to the Amalgamated Meat Cutters case (Supp. Memo. 26-27) overlooks the express statement by the court in that case that "we need not consider whether an action for judicial review can be brought against the President eo nomine." 337 F.Supp. at 761. It overlooks also Soucie v. David, 448 F.2d 1067, 1073 n. 17 (D.C. Cir. 1971), in which the Court of Appeals for the District of Columbia Circuit expressly left open whether the President is subject to the Administrative Procedure Act. Aside from the general principle, discussed at pp. 46-49 below, that statutory language that does not refer in terms to the President should not be held to apply to him, it is hard to imagine that a statute that excludes from its operations even the governments of the territories and the Mayor of the District of Columbia should be held to have included, in its bland and neutral language, the President of the United States.

sanction, relief or the equivalent or denial thereof, or the failure to act," 5 U.S.C. § 551(13) -- would preclude such a conclusion.

Judicial review under the Administrative Procedure Act is limited to persons who have suffered a legal wrong. Legal wrong "means that something more than mere adverse personal effect must be shown -- that is, that the adverse effect must be an illegal effect," S. Rep. No. 752, 79th Cong., 1st Sess. (1945) at p. 26, and the legal wrong must be one that the courts and statutes have recognized as constituting a ground for judicial review. Attorney General's Manual on the Administrative Procedure Act 96 (1947.) As stated in Kansas City Power & Light Co. v. McKay, 225 F.2d 924, 932 (D.C. Cir.), cert. denied 350 U.S. 884 (1955), judicial review is provided for the benefit of those "whose legal rights have been violated." The plaintiffs have not pointed to any legal right that has been violated and that would entitle them to judicial review.

Moreover, it is widely held that the Administrative Procedure Act is not an independent basis for federal jurisdiction. See, e.g., Arizona State Dept. of Public Welfare v. Dept. of Health, Education, and Welfare, 449 F.2d 456, 464 (9th Cir. 1971), cert. denied 405 U.S. 919 (1972); Zimmerman v. United States Government, 422 F.2d 326, 330-331 (3d Cir.), cert. denied 399 U.S. 911 (1970); Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529, 532 (8th Cir. 1967); Chournos v. United States, 335 F.2d 918, 919 (10th Cir. 1964); Local 542, International Union of Operating Engineers v. N.L.R.B., 328 F.2d 850, 854 (3d Cir.), cert. denied 379 U.S. 826 (1964); Ove Gustavsson Contracting Co. v. Floete, 278 F.2d 912, 914 (2d Cir.), cert. denied 364 U.S. 894 (1960).

That is the rule repeatedly followed in this Circuit, and for an excellent reason. Section 10(b) of the Administrative Procedure Act -- now 5 U.S.C. § 703 -- allows suit in "any court of competent jurisdiction" and thus, as the Court of Appeals very early said, "can therefore hardly be argued to extend the jurisdiction of any court to cases not otherwise within its competence." Almour v. Pace, 193 F.2d 699, 701 n. 5 (D.C. Cir. 1951). Again in Kansas City Power & Light Co. v. McKay, 225 F.2d 924, 932-933 (D.C. Cir.), cert. denied 350 U.S. 884 (1955), the Court of Appeals said:

Section 10(b) of the Administrative Procedure Act does not help appellants. The reference in that section to "any court of competent jurisdiction" does not of itself establish the jurisdiction of the Federal courts over an action not otherwise cognizable by them.

To the same effect, see Pan American World Airways, Inc. v. C.A.B., 392 F.2d 483, 494 (D.C. Cir. 1968).<sup>8</sup>

Thus the Administrative Procedure Act serves the plaintiffs no better than do §§ 1331, 1345, or 1361 of the Judicial Code. The simple fact is that Congress has never empowered the district courts to hear a suit of the kind plaintiffs are bringing.

#### V. This Court Lacks In Personam Jurisdiction

Plaintiffs allege in paragraph 5 of the Complaint that Richard M. Nixon is sued in both his official and individual capacity, but it is clear from the remaining allegations in the Complaint that the acts complained of -- the refusal to comply with the subpoenas -- were acts performed in his official capacity as President of the United States.

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8 There is no Supreme Court decision to the contrary. Although Justice Brennan, in his concurring opinion in Rusk v. Cort, 369 U.S. 367, 380 (1962), makes a passing reference to the Declaratory Judgment Act and the Administrative Procedure Act as "general grants of jurisdiction," he must have intended some other nuance of the term "jurisdiction," since it is well established that the Declaratory Judgment Act is not a grant of jurisdiction. Zimmerman v. United States, 422 F.2d 326, 331 n. 7 (3d Cir.), cert. denied 399 U.S. 911 (1970).

A suggestion that a President of the United States may be sued, either officially or individually, to remedy official discretionary acts raises, of course, a fundamental question of separation of powers. Much has been said about separation of powers in the "political question" discussion in Part III of the brief and will not be repeated here. It is sufficient to touch briefly on the question to show that courts have viewed the separation of powers as a barrier to jurisdiction over the person of the President.

The recent case of National Association of Internal Revenue Employees v. Nixon, 349 F.Supp. 18 (D.D.C. 1972), appeal docketed No. 72-1929, D.C. Cir., is the most recent example of a case where a court dismissed an action against the President on the basis of separation of powers. The court stated:

The fundamental doctrine of separation-of-powers dictates this result, and it has been settled since the case of State of Mississippi v. Johnson, 4 Wall. (71 U.S.) 475 (1866). In that case the Supreme Court commented on the impropriety of judicial interference with executive functions as follows:

The impropriety of such interference will be clearly seen upon considerations of its possible consequences.

Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. 71 U.S. at 501.

349 F.Supp. at 21-22.

The court also relied on Trimble v. Johnston, 173 F.Supp. 651 (D.D.C. 1959), where Judge Holtzoff noted:

It is no part of the judicial function to supervise or control the business of the executive or legislative departments of the Government. Otherwise the judiciary, instead of being one of the three co-ordinate branches, would be supreme over the other two. We would then have a government by the courts, instead of by the Congress and the President. Manifestly the Founding Fathers did not contemplate such a result.

173 F.Supp. at 653. See also Reese v. Nixon, 347 F.Supp. 314, 316 (C.D. Cal. 1972); San Francisco Redevelopment Agency v. Nixon, 329 F.Supp. 672 (N.D. Cal. 1971).

Two courts have entertained the thought that a suit may be brought against the President. See Meyers v. Nixon, 339 F.Supp. 1388, 1399 (S.D.N.Y. 1972); Atlee v. Nixon, 336 F.Supp. 790, 791 (E.D.Pa. 1972). In both cases, the courts found other grounds for decision, and despite their dicta, which is not persuasive, they are not authority for plaintiffs in this case.

The suit is against the President of the United States, not against some lower government officer. As former President -- and later Chief Justice -- Taft wrote:

The Supreme Court seems to make a broad distinction between issuing process against the President and against his subordinates under laws requiring the specific performance of a definite act. I cannot think that the Court would ever issue a mandamus to compel the President to perform even an act purely ministerial, though it has often issued such a writ against one of his subordinates. The Supreme Court has a number of times intimated that the President's office is of such a high character, that officially he is beyond the compulsory process of the Court.

Taft, Our Chief Magistrate and His Powers 132 (1916).

#### VI. Plaintiffs Have Exceeded Their Legislative Authority Under Both the Constitution and Their Enabling Resolution

The nature of the assault upon the Presidency by the Senate Select Committee and the gravity of the Constitutional confrontation that it has provoked require this Court to examine carefully the authority of the Committee. That authority must be closely measured against both the Constitutional limitations of the legislative branch and limitations found in the delegation of authority to the Committee by the Senate.

#### A. Constitutional Limits

The power of the Congress to conduct investigations is

inherent in the legislative process and is broad. Congress cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change. Therefore the power of inquiry is a necessary and appropriate attribute of the power to legislate. McGrain v. Daugherty, 273 U.S. 135, 175 (1927). However, this power of inquiry is not unlimited. Watkins v. United States, 354 U.S. 178, 187 (1956); United States v. Rumely, 345 U.S. 41, 58 (1953) (Douglas, J., concurring); Marshall v. Gordon, 243 U.S. 521 (1917); Kilbourn v. Thompson, 103 U.S. 168 (1880).

The Senate Select Committee has asserted a broad mandate to "get to the bottom of widespread but incompletely substantiated suspicions of wrongdoing at the highest executive levels." (Memo. 15). In this action the movants have subpoenaed tape recordings and other materials in an effort to resolve the conflicting testimony adduced at the Senate hearings and thus determine "the precise extent of malfeasance in the executive branch." (Memo. 16). This inquiry is not germane to the Committee's legislative purpose, and indeed constitutes a usurpation of those duties exclusively vested in the executive and the judiciary.

The Senate Select Committee was established to investigate and study the extent to which illegal, improper, or unethical activities existed in the Presidential election of 1972 and related events, and to "determine whether in its judgment any occurrences \* \* \* revealed \* \* \* indicate the necessity or desirability of the enactment of new congressional legislation to safeguard the electoral process by which the President of the United States is chosen." S. Res. 60, 93rd Congress, 1st Sess. (1973). Accordingly, the Committee's mandate was to

identify illegal, improper, or unethical activities and recommend corrective legislation, not to resolve the conflicts in the evidence and adjudicate questions of guilt or innocence. Such an inquiry is not germane to the Committee's legislative purpose, and is outside its charge. Clearly the movants can honor their legislative mandate without access to the tapes.<sup>9</sup>

Most significantly the Senate Select Committee has conducted, and in this action is endeavoring to continue to conduct, a criminal investigation and trial. The Committee is seeking to ferret out all the facts, resolve all the conflicts in the evidence, and determine the guilt or innocence of all the alleged participants. The Committee has apparently conceived its primary mission as one of determining culpability on the part of the President. "What did the President know and when did he know it." See, e.g., S. Tr. 2096, 3999. This theme runs throughout the Committee's hearing and legal papers. Thus it has been stated:

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9 It should be noted that at least one member of the Committee, although joining in the present action, has acknowledged that production of the tapes is not essential to the legislative functions of the Committee. The Washington Post of September 10, 1973, p. A2, reported the following statement of Senator Daniel K. Inouye:

"I think we can proceed and file an adequate report without the tapes," said Inouye, a member of the Senate Watergate Committee.

"As far as I am concerned personally," he said on NBC's "Meet the Press" program, this is where the difference between a legislative proceeding and a judicial proceeding comes in. If this were a criminal matter, I would say that the tapes are absolutely necessary."

He was asked, "You personally don't care then who is telling the truth?"

"It is not our business to decide the guilt or innocence of any part," Inouye responded.

Unfortunately, the involvement or noninvolvement of the President himself in that congeries of criminal activities falling under the general rubric of "Watergate" is very much an integral part of the present investigation. That fact is perhaps best epitomized by the persistent inquiry of Senator Baker -- "What did the President know and when did he know it?" John Wesley Dean, III, in his sworn testimony before the Select Committee, has accused the President of complicity in serious crimes. If Dean be believed the President may be guilty of several crimes, including obstruction of a criminal investigation\*\*\* misprision of a felony\*\*\* conspiracy to commit an offense or to defraud the United States\*\*\* and unlawfully influencing a witness\*\*\*. And Dean's charges are consistent with other evidence in the record that bears on the question of presidential involvement (there is, of course, also evidence in the record that would exonerate the defendant President of such charges). In such circumstances, the Committee would be derelict if it did not proceed to further examination of the President's complicity or lack thereof, no matter how distasteful that task may be. (Memo. 3).

[T]he Committee's request, unlike that of the Special Prosecutor, focuses on the President's own possible criminality. (Supp. Memo. 2).

For example, with the Dean-Presidential tapes in hand, it would be much easier to determine the extent of Presidential involvement in the Watergate affair. (Affidavit of Senator Sam J. Ervin, Jr., p. 3).

However, Congress is not a law enforcement or trial agency. These are functions of the Executive and Judicial departments of the government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. The investigation conducted by the Committee is in excess of the power conferred on Congress by the Constitution and the movants have no lawful authority to subpoena the tapes.

In a similar situation the Supreme Court in Kilbourn v. Thompson, 103 U.S. 168 (1880), determined that the House of Representatives had exceeded its authority in directing one of its committees to investigate the circumstances surrounding the bankruptcy of Jay Cooke and Company, in which the United States had deposited funds. The committee became particularly interested in a private real estate pool that was a part of the financial structure



and jailed Kilbourn for refusing to answer certain questions about the pool and to produce certain books and papers. The Court found that the subject matter of the inquiry was "in its nature clearly judicial," 103 U.S. at 192, not legislative, and the House was exceeding the limit of its own constitutional authority.<sup>10</sup> Accordingly the committee had no lawful authority to require Kilbourn to testify as a witness or produce papers.

It is unquestionably the duty of all citizens to cooperate with Congress in its efforts to obtain the facts needed for intelligent legislative action and all citizens unremitting obligation to respond to subpoenas. However, this duty adheres only with respect to matters within the province of proper investigation. Watkins v. United States, 354 U.S. 178, 187-188 (1956). Here the Committee is acting in excess of the power conferred on Congress by the Constitution.

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10 The Court in Kilbourn v. Thompson, 103 U.S. 168 (1880) observed that:

It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.

103 U.S. at 190-191.

The fundamental holding of Kilbourn was not impaired by the subsequent cases of McGrain v. Daugherty, 273 U.S. 135 (1927), and Sinclair v. United States, 279 U.S. 263 (1929), so heavily relied upon by the Committee. In both cases the Supreme Court expressly acknowledged the requirements that Congressional inquiries be related to a proper legislative purpose. In McGrain, the Supreme Court found that an inquiry into the conduct of the office of Attorney General reflected legitimate legislative concerns and upheld a subpoena of the brother of the former Attorney General. Pointing out that the office of Attorney General was "subject to regulation by Congressional legislation," and that the "only legitimate object the Senate could have in ordering the investigation was to aid it in legislating," the Court concluded that, in view of the subject matter, it would presume that legislation was the real object of the investigation. 273 U.S. at 178. Similarly, in Sinclair, the Court found that an inquiry into oil leases was properly related to Congressional authority over public lands and rejected, on the basis of the record, the factual argument that the investigation was not in aid of legislation.

The Supreme Court has quite understandably and wisely sought to avoid the Constitutional trauma inherent in a holding that Congress had exceeded its authority. But Kilbourn, and the concept that a legislative purpose is an indispensable prerequisite for a valid inquiry, are the framework in which the Court has found other grounds for declining to enforce Congressional subpoenas. Subsequent cases have indicated that the "presumption" indulged by the Court in McGrain may be overcome if the connection with a proper legislative purpose becomes too tenuous. And the

Supreme Court has shown particular concern where Congressional inquiries have threatened to encroach upon other important Constitutional rights. See Watkins v. United States, 354 U.S. 178 (1956); United States v. Rumely, 345 U.S. 41 (1953).

In United States v. Rumely, 345 U.S. 41 (1953), where it was argued that the inquiry trespassed upon the First Amendment, the Court said:

Whenever constitutional limits upon the investigative power of Congress have to be drawn by this Court, it ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits.

345 U.S. at 46. The Court went on to hold that questions put to the defendant exceeded the bounds of the resolution by the House of Representatives creating the Committee -- notwithstanding the subsequent ratification of the Committee's action by the House.

In Watkins v. United States, 354 U.S. 178 (1957), the Supreme Court affirmed that:

No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to "punish" those investigated are indefensible.

354 U.S. at 187. The Court cited Kilbourn for the proposition that an investigation unrelated to legislative purpose would be "beyond the powers conferred upon the Congress in the Constitution" and Rumely for the proposition that "the mere semblance of legislative purpose would not justify an inquiry in the face of the Bill of Rights." 354 U.S. at 198. The Court held that the House Resolution in question was so broad that the defendant could not fairly determine whether the questions put to him were pertinent to the Committee's inquiry.

In this case, as in Rumely and Watkins, there is a collision between the Congressional pursuit of information and an important Constitutional right. In Rumely and Watkins the Supreme Court was concerned with the impact of Congressional investigations upon First Amendment freedoms. Here the investigation directly challenges the Presidency. The importance of confidentiality to the Office of the President, and the implications of seeking to impose judicial control upon the conduct of that office, are treated elsewhere in this brief. Certainly the preservation of the ability of Presidents to function is no less crucial to our Constitutional system than the vindication of First Amendment rights.

Watkins is important too for the flat and famous statement in which the Court said: "We have no doubt that there is no congressional power to expose for the sake of exposure." 345 U.S. at 200. <sup>11</sup> Of course the Senate is authorized to investigate campaign practices to see if legislation is needed in that area. But every time a member of the Committee speaks of the importance of "who said what to whom" or "what the President knew and when," and everytime the Committee's briefwriters harp, as they do so

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11 In Watkins the Court also pointed with envy to England, where investigations of this kind are entrusted to royal commissions, removed from the turbulent forces of politics and partisan considerations. "Seldom, if ever, have these commissions been given the authority to compel the testimony of witnesses or the production of documents." Nevertheless, they have, as the Court noted, enjoyed "success in fulfilling their fact-finding missions without resort to coercive tactics \* \* \*." 354 U.S. at 191-192.

repeatedly, on "the President's own possible criminality" (Supp. Memo. 2), they make it manifest that what they are interested in here is "to expose for the sake of exposure."

#### B. The Enabling Resolution

Quite aside from the fact that the Senate Committee has exceeded its legislative authority, it has also exceeded the bounds of Senate Resolution 60. There is no language in Senate Resolution 60 that can fairly be read as authorizing the issuance of a subpoena to the President.

The Select Committee contends that the President was encompassed within the authorization to subpoena an "officer" of the executive branch. (Supp. Memo. 10). However, since no committee of Congress has ever subpoenaed a President, could any member of the Senate suppose that a grant of general subpoena power was intended to authorize this wholly unprecedented action? As Professor Charles L. Black stated:

Perhaps a lexicographically programmed computer might print out the judgment that the President is an "officer" or "employee" of the executive branch. But that is not the way we construe statutes. Is it not perfectly plain that such language is entirely inapt, as a matter of usage, to designate the President of the United States.

Cong. Rec. E5321 (daily ed. Aug. 1, 1973).

There are three points here that merit attention, and that converge to indicate that Senate Resolution 60 cannot be read as authorizing a subpoena to the President of the United States.

First, it is well established in the context of legislative investigations that the authority of the investigating committee is to be construed in a way that will avoid Constitutional questions if this is possible.

United States v. Rumely, 345 U.S. 41 (1953).

Second, when Constitutional rights are at stake, the legislative body that authorized the inquiry must make it unmistakably clear that it wants the particular information that is being sought. Watkins v. United States, 354 U.S. 178 (1957), is again much in point:

Protected freedoms should not be placed in danger in the absence of a clear determination by the House or the Senate that a particular inquiry is justified by a specific legislative need.

\* \* \*

The reason no court can make this critical judgment is that the House of Representatives itself has never made it. Only the legislative assembly initiating an investigation can assay the relative necessity of specific disclosures.

354 U.S. at 205, 206.

That was the point also of Chief Justice Warren's opinion in the companion case of Sweezy v. New Hampshire, 354 U.S. 234 (1957). The New Hampshire Legislature had set up the Attorney General as a one-man committee of the legislature to investigate subversion, under a very broad and vague resolution.

The Attorney General has been given such a sweeping and uncertain mandate that it is his decision which picks out the subjects that will be pursued, what witnesses will be summoned and what questions will be asked. In this circumstance, it cannot be stated authoritatively that the legislature asked the Attorney General to gather the kind of facts comprised in the subjects upon which petitioner was interrogated.

354 U.S. at 253.

Finally, there is a settled and sensible rule in construing general language, which was articulated by the Court in United States v. United Mine Workers of America,

330 U.S. 258, (1947).<sup>12</sup> The Court there held that the general language of the Norris-LaGuardia Act did not apply when an injunction was sought by the United States, since the statute did not in terms apply to suits by the United States. Chief Justice Vinson said for the Court, at 272-273:

There is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect. It has been stated, in cases in which there were extraneous and affirmative reasons for believing that the sovereign should also be deemed subject to a restrictive statute, that this rule was a rule of construction only. Though that may be true, the rule has been invoked successfully in cases so closely similar to the present one, and the statement of the rule in those cases has been so explicit, that we are inclined to give it much weight here.

(footnotes omitted).

We are not suggesting that the President is a sovereign, but his unique position in our Constitutional system is such that a similar principle surely should apply, and a Senate resolution should not be construed to deprive the President of a privilege he has always had without explicit

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12 For other applications of the proposition so well stated in the Mine Workers case, see: F.P.C. v. Tuscarora Indian Nation, 362 U.S. 99, 120 (1960); Leiter Minerals v. United States, 352 U.S. 220, 224-226 (1957); United States v. Wittek, 337 U.S. 346, 358-359 (1949); United States v. Wyoming, 331 U.S. 440, 449 (1947); United States v. Stevenson, 215 U.S. 190 (1909); United States v. American Bell Telephone Co., 159 U.S. 548, 553-555 (1895); Lewis v. United States, 92 U.S. 618, 622 (1875); United States v. Herron, 20 Wall. (87 U.S.) 251, 263 (1873); Dollar Savings Bank v. United States, 19 Wall. (86 U.S.) 227, 238-239 (1873).

language to that effect in the resolution. 13

Given the long history in which neither House of Congress has ever subpoenaed a President of the United States, it is beyond belief that any member of the Senate, when voting to authorize the Select Committee to direct subpoenas to an "officer," had any thought that he was voting to empower the Committee to take the unprecedented and unauthorized action that has led to the present litigation.

This point is merely further emphasized by the failure of the Committee to follow the procedure provided by Resolution 60 in the event of noncompliance with a subpoena. In such a case, § 3(a)(6) of the Resolution specifically authorizes the Committee to make appropriate recommendations to the full Senate. The Committee attempts to characterize that section as merely providing a "wholly discretionary option" to the Committee. (Supp. Memo. 12). Once again, the comments of Professor Black are instructive as to the significance of § 3(a)(6):

Does not this language (at the very least when applied to such an utterly unique and politically charged question as a "willful failure or refusal"

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- 13 In Dollar Savings Bank v. United States, 19 Wall (86 U.S.) 227, 239 (1873) the Supreme Court stated:

It is a familiar principle that the King is not bound by any act of Parliament unless he be named therein by special and particular words. The most general words that can be devised\*\*\*affect not him in the least, if they may tend to restrain or diminish any of his rights and interests\*\*\*The rule thus settled respecting the British Crown is equally applicable to this government\*\*\*It may be considered as settled that so much of the royal prerogatives as belonged to the King in his capacity of *parens patriae*, or universal trustee, enters as much into our political state as it does\*\*\*into the principles of the British Constitution.



of the President himself) designate the exclusive procedure to be followed by the Committee? Is it not reasonable to infer from it a direction by the Senate that the matter of possible contempt be brought back to the whole Senate, for resolution upon action? Is the expressed power to "make recommendations" not an implied exclusion of independent action by the Committee?

Cong. Rec. E5321 (daily ed. Aug. 1, 1973) (emphasis in original).

Heretofore no committee of Congress has asked the courts to enforce a subpoena for it. Section 3(a)(6) of S. Res. 60 indicates that the Senate contemplated that usual procedures would be followed, and that the Senate itself would be advised, if there were a question of non-compliance with a subpoena, rather than that the Committee would go off on a frolic and detour of its own. Here, as in Reed v. County Commissioners, 277 U.S. 376 (1928):

In the absence of some definite indication of that purpose, the Senate may not reasonably be held to have intended to depart from its established usage.

Authority to exert the powers of the Senate to compel production of evidence differs widely from authority to invoke judicial power for that purpose.

277 U.S. at 389.

The Committee lacks authority to bring this suit, both because it is an attempt to expose for the sake of exposure, and thus beyond the legitimate legislative functions of the Committee, and because the Senate has not authorized the Committee to subpoena or to sue a President.

VII. The President Has the Power to Withhold Information From Congress the Disclosure of Which He Determines to be Contrary to the Public Interest

Plaintiffs have asked this Court to enforce subpoenas purportedly issued to obtain information they claim is relevant to their investigation. The President has refused

on the ground that he has determined disclosure would be contrary to the public interest. His stated reason is the importance of maintaining confidential communications between the President and his closest advisers. This Court has recognized the importance of this confidentiality in its opinion in Misc. No. 47-73. Opinion at 5 & n. 8. We reassert the importance of that principle here,<sup>14</sup> but before dealing with it in detail it is necessary to discuss the basis for plaintiffs' claim for the right to information and the basis for the President's refusal to furnish it.

A. Basis for Executive Privilege

Plaintiffs refer in their "Historical Appendix" to a series of instances where Presidents and their aides have cooperated with Congressional requests for information. Their analysis includes instances where either testimony or documents were furnished to Congress by the Executive on a voluntary basis. We do not doubt the accuracy of the analysis, but wish only to point out that it is confined to voluntary disclosures. Plaintiffs have not cited any authority, either historical or legal, for the proposition that a President can be compelled to furnish information to the Congress. There is good reason for this. There

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14 As his Ninth Defense to plaintiffs' Complaint, the President asserted that the subpoena attached as Exhibit D to plaintiffs' Complaint was so unreasonably broad and oppressive as to make compliance impossible. This should be obvious from the face of the subpoena itself. It specifies no time period and demands a wide variety of records relating to 25 persons on a number of different subjects. Compliance would require a complete review of virtually all records in the White House. If the Court dismisses this matter for want of jurisdiction or sustains the President's claim of privilege, there will be no need to pursue this issue. However, if it would be helpful to the Court in reaching its decision appropriate affidavits will be filed to sustain the President's position on this issue.

is no such authority.<sup>15</sup>

There are, however, many instances where Presidents have refused to furnish information to Congress and, in each case, the refusal has been accepted.

The frequently exercised, long-standing freedom of the executive to refuse demands by Congress for the production of documents does not require extended discussion.<sup>16</sup> Under the Continental Congress, the relationship between legislature and executive had been modeled on the British system. The executive departments were, in effect, answerable to the legislature, and could be called on for an accounting. A resolution of the Continental Congress creating the Department of Foreign Affairs, whose head was appointed by and held office at the pleasure of Congress, provided:

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15 The only legal authorities upon which plaintiffs rely are demands for information in connection with legal proceedings. There the considerations are quite different, as this Court has recognized in its opinion in Misc. No. 47-73. Opinion at 6 n. 11. See also the quotation from Professor Corwin set out at p. 3 above.

16 The Senate Committee suggests that the President has somehow waived the privilege he now invokes by virtue of allowing his aides to testify and by permitting H. R. Haldeman to review several of the tapes. (Memo. 28-33). Such a suggestion hardly merits comment beyond the observation that United States v. Reynolds, 345 U.S. 1, 11 (1953) specifically holds to the contrary. The Committee's feeble attempt to distinguish that case (Motion for Summary Judgement at 31-32) is unpersuasive. As Alexander Bickel has decisively observed, "Far from being waived, the privilege, it seems to me, is as much exercised when information is released as when it is withheld." Bickel, Wretched Tapes (cont.), N.Y. Times, August 15, 1973, p. 33.

That the books, records and other papers of the United States, that relate to this department, be committed to his custody, to which, and all other papers of his office, any member of Congress shall have access: provided that no copy shall be taken of matters of a secret nature without the special leave of Congress.

This was completely changed by the Constitution in establishing the three independent branches. See Wolkinson, Demands of Congressional Committees for Executive Papers, 10 Fed. Bar J. 319, 328-330 (1949).

Since then there has arisen an often asserted, much discussed, and well recognized privilege of the President to deny Congress access to documents whenever either the President or the head of a department has deemed it in the public interest to do so. From the administration of Washington to the present, Presidents have repeatedly asserted the privilege, and, when forced to a showdown, Congress has always yielded and ceased to press its demands. <sup>17</sup> A recent instance was the refusal of President Truman to turn over to the House Committee on Un-American

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- 17 The following is a partial list of examples of successful assertions of the privilege, comprising partly assertions by the President and partly assertions by department heads:

President	Date	Type of Information Refused
Washington	1796	Instructions to U. S. Minister concerning Jay Treaty.
Jefferson	1807	Confidential information and letters relating to Burr's conspiracy.
Monroe	1825	Documents relating to conduct of naval officers.
Jackson	1833	Copy of paper read by President to heads of Departments relating to removal of bank deposits.
	1835	Copies of charges against removed public official.
		List of all appointments made without Senate's consent between 1829 and 1836, and those receiving salaries without holding office.

Activities files relating to the federal employee loyalty program. Directive of March 13, 1948, 13 Fed. Reg. 1359 (1948).

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President	Date	Type of Information Refused
Tyler	1842	Names of members of 26th and 27th Congress who have applied for office.
Tyler	1843	Colonel Hitchcock's report to the War Department dealing with alleged frauds practiced on Indians, and his views of personal characters of Indian delegates.
Polk	1846	Evidence of payments made through State Department on President's certificates, by prior administration.
Fillmore	1852	Official information concerning proposition made by King of Sandwich Islands to transfer Islands to U.S.
Buchanan	1860	Message to Protest to House against Resolution to investigate attempts by Executive to influence legislation.
Lincoln	1861	Dispatches of Major Anderson to the War Department concerning defense of Fort Sumter.
Grant	1876	Information concerning executive acts performed away from Capitol.
Hayes	1877	Secretary of Treasury refused to answer questions and to produce papers concerning reasons for nomination of Theodore Roosevelt as Collector of Port of New York.
Cleveland	1886	Documents relating to suspension and removal of 650 Federal officials.
Theodore Roosevelt	1909	Attorney General's reasons for failure to prosecute U.S. Steel Corporation. Documents of Bureau of Corporations, Department of Commerce.

Reference to the unbroken record of successful assertions of privilege in practice is particularly significant in this area of separation of powers. In the construction of any clause of the Constitution uninterrupted usage continuing from the early days of the Constitution would be significant.

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President	Date	Type of Information Refused
Coolidge	1924	List of companies in which Secretary of Treasury Mellon was interested.
Hoover	1930	Telegrams and letters leading up to London Naval Treaty.
	1932	Testimony and documents concerning investigation made in Treasury Department.
Franklin D. Roosevelt	1941	Federal Bureau of Investigation reports.
	1943	Director, Bureau of Budget, refused to testify and to produce files.
	1943	Chairman, Federal Communications Comm., and Board of War Communications refused records.
	1943	General Counsel, Federal Communications Commission, refused to produce records.
	1943	Secretaries of War and Navy refused to furnish documents, and permission for Army and Naval officers to testify.
	1944	J. Edgar Hoover refused to give testimony and to produce President's directive.
Truman	1945	Issued directions to heads of executive departments to permit officers and employees to give information to Pearl Harbor Committee, but the President's directive did not include any files or written material.
	1947	Civil Service Commission records concerning applicants for positions.

See Wolkinson, Demands of Congressional Committees for Executive Papers, 10 Fed. Bar J. 103, 147 (1949).

More recent examples are described in Kramer & Marcuse, Executive Privilege -- A Study of the Period 1953-1960, 29 Geo. Wash. L. Rev. 623 (part 1) and 827 (part 2) (1961). See also Younger, Congressional Investigations: A Study in the Separation of Powers, 20 Univ. Pitt. L. Rev. 755 (1959).

Both officers, lawmakers and citizens naturally adjust themselves to any long-continued action of the Executive Department -- on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself -- even when the validity of the practice is the subject of investigation.

United States v. Midwest Oil Co., 236 U.S. 459, 472-

473 (1915); United States v. MacDaniel, 7 Pet. (7 U.S.)

1, 13-14 (1833). Here, moreover, because the doctrine of separation of powers is not contained in express language in the Constitution, Ex parte Grossman, 267 U.S. 87, 119 (1925), and because the functioning of our Government depends so largely upon limits on the powers of each branch derived from practical adjustments based on a fair regard by each for the necessities of the others, we think that the historic usage is especially meaningful. "Even constitutional power, when the text is doubtful, may be established by usage." Inland Waterways Corp. v. Young, 309 U.S. 517, 525 (1940).

These successful executive assertions of privilege against Congress have frequently been acknowledged by Congress itself. See, e.g., H.Rep. No. 1595, 80th Cong., 2d Sess., (1948), at 2-3,7. Even in the heat of contest members of Congress have recognized the wisdom of acceding to the Constitutional principles here asserted.

During the administration of President Hayes, for example, the House Judiciary Committee, under the chairmanship of Benjamin F. Butler, pointed out that all resolutions directed to the President relating to the production of records properly would contain the clause "if in his judgment not inconsistent with the public

interest." H.Rep. No. 141, 45th Cong., 3rd Sess., (1879), at 3. And the Committee continued, id. at 3 and 4:

\* \* \* whenever the President has returned (as sometimes he has) that, in his judgment, it was not consistent with the public interest to give the House such information, no further proceedings have ever been taken to compel the production of such information. Indeed, upon principle, it would seem that this must be so. The Executive is as independent of either house of Congress as either house of Congress is independent of him, and they cannot call for the records of his action or the action of his officers against his consent, any more than he can call for any of the journals and records of the House or Senate.

The decision as to whether there should be compliance with a particular request was the Executive's, the committee stated:

Somebody must judge upon this point. It clearly cannot be the House or its committee, because they cannot know the importance of having the doings of the executive department kept secret. The head of the executive department, therefore, must be the judge in such case and decide it upon his own responsibility to the people, and to the House, upon a case of impeachment brought against him for so doing, if his acts are causeless, malicious, willfully wrong, or to the detriment of the public interests.

There are many other instances of Congressional recognition of the executive privilege, vis-a-vis Congress, including one which gave rise to a great Congressional debate, occupying the Senate for almost two weeks, during President Cleveland's first administration. 17 Cong. Rec. 2211-2814 (1886). See Sen. Misc. Doc., Vol. 7, 52d Cong., 2d Sess. (1886), at 235-243; 8 Richardson, Messages and Papers of the Presidents 375-383 (1886); 17 Cong. Rec. 4095 (1886). In the course of this debate many past examples of executive refusals to produce papers demanded by Congress were discussed. See, e.g., 17 Cong.



Rec. 2622-2623 (1886). 18

Particularly illuminating is Congress's reaction to the President's Directive of March 13, 1948, Fed. Reg. 1359 (1948), relating to the loyalty program. At that time, a joint resolution was introduced, H.J. Res. 342, 80th Cong., 2d Sess. (1948) purporting to direct all executive departments and agencies to make available to Congressional committees any information deemed necessary to the committees for the performance of their work.

The resolution was opposed on the ground that it was unconstitutional. A strong minority report was filed in the House, which stated in part:

The majority report recognizes that this issue between the executive and the legislative branch is not a new one, but has been raised periodically over the entire history of our Government and without regard to the political affiliations of the respective Presidents or the political complexions of the Congresses whose authority in this regard the Presidents challenged. There can be no disputing this fact. There have been made from time to time over the period of our country's history requests and demands upon the executive branch of our Government by the Congress or its committees seeking information, to reveal which, in the opinion of the executive branch, would have been inconsistent with its duties in this regard. On such occasions the executive branch, as a matter of history, as a matter of tradition, and as a matter of constitutional prerogative, has declined to comply with such requests or demands. Over the years, President after President has asserted his prerogative in this respect. By now it is well established that under our tripartite form of government neither the legislative nor the judicial branches may question the Executive with respect to matters within his province and as to which he, the Executive, determines that response to the questions would be contrary to the public interest.

H. Rep. No. 1595, 80th Cong., 2d Sess. (1948), at 7.

The resolution was ultimately passed by the House but died

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- 18 This debate ended with the approval by the Senate, in a vote on party lines, of resolutions condemning the President and the Attorney General. No result came from the resolutions. See 17 Cong. Rec. 2813-2814 (1886).

in the Senate Committee on Expenditures in the Executive Departments.

A more recent instance was the Congressional reaction to President Kennedy's refusal to disclose the names of Defense Department speech reviewers. Committee on Armed Services, U.S. Senate, Military Cold War Escalation and Speech Review Policies, 87th Cong., 2d Sess. (1962), at 338, 369-370, 508-509, 725, 730-731. The Senate Subcommittee, speaking through Senator Stennis, conceded:

We now come face to face and are in direct conflict with the established doctrine of separation of powers \* \* \*

I know of no case where the Court has ever made the Senate or the House surrender records from its files, or where the Executive has made the Legislative Branch surrender records from its files -- and I do not think either one of them could. So the rule works three ways. Each is supreme within its field, and each is responsible within its field.

Id. at 512.

During the hearings on the nomination of the Honorable Abe Fortas to be Chief Justice of the United States, Senator Ervin began to question the nominee about his participation in discussions with President Johnson that led to an order sending federal troops into Detroit. Senator Ervin then said, however: "I will not insist upon your answer, because it is a prerogative of communications in the executive branch of the Government." Hearings before the Committee on the Judiciary, U. S. Senate, Nominations of Abe Fortas and Homer Thornberry, 90th Cong., 2d Sess. (1968), at 124. The question was not answered. At a later point, in response to a different question from Senator Ervin, Justice Fortas answered:

Senator, I will not go into any conversations, either to affirm them or to deny them, that I have had with the President. I ask you please to understand that, and please to excuse me. I know how easy it is to say no, the President did not say something to me. But the question is "What did he say?" would follow, and so on. I must ask you to indulge me to this extent. I have endeavored Senator, and Mr. Chairman, to err, if I erred, on the side of frankness and candor with this committee. But I think that it is my duty to observe certain limits, and one of those limits is any conversation, either affirmation or denial, that I may have had with the President of the United States.

Id. at 167-168. Later in the hearings, Senator McClellan said to the nominee:

I am not quarrelling with your position that you cannot say and do not want to say what conversations you may have had with the President. I respect that position if you wish to take it.

Id. at 225. At no point in the hearings did any Senator disagree with these views of Senator Ervin, Justice Fortas, and Senator McClellan.

During the hearings before the Senate Judiciary Committee relating to the nomination of Mr. Richard G. Kleindienst as Attorney General, Mr. Peter Flanigan, Special Assistant to the President, was invited to appear and testify about ITT matters. The Counsel to the President responded by pointing out that under the doctrine of separation of powers and long established historical precedents, members of the President's immediate staff do not appear and testify before Congressional Committees with respect to the performance of their duties. Thereafter, the Senate Judiciary Committee adopted a resolution on April 18, 1972, in which it was agreed that Mr. Flanigan "is not required to testify to any knowledge based on confidential communications between him and the President or between him and other aides of the President." Thereafter, a Presidential Assistant appeared and testified to the matters agreed to. Hearings before the Committee on the Judiciary, U. S. Senate,

Nomination of Richard G. Kleindienst, of Arizona, to be Attorney General. 92nd Cong., 2d Sess. (1972), at 1630-1631.

**B. The Need for Confidentiality**

There has long been general recognition that high officers in every branch of government cannot function effectively unless they are able to preserve the confidentiality of their communications with their intimate advisers. In Environmental Protection Agency v. Mink, 410 U.S. 73, 87 (1973), the Court quoted with approval the statement of Justice Reed, sitting by designation in the Court of Claims, in Kaiser Aluminum & Chemical Corp. v. United States, 157 F.Supp. 939, 946 (Ct.Cl. 1958):

There is a public policy involved in this claim of privilege for this advisory opinion -- the policy of open, frank discussion between subordinate and chief concerning administrative action.

Discussions of this kind are regarded as privileged "for the benefit of the public, not of executives who may happen to then hold office," id. at 944, since it is the public that is served when those who represent it are able to make important decisions with the wisdom that only open and frank discussion can provide. Judge Robinson has spelled out this point more fully:

This privilege, as do all evidentiary privileges, effects an adjustment between important but competing interests. There is, on the one hand, the public concern in revelations facilitating the just resolution of legal disputes, and, on the other, occasional but compelling public needs for confidentiality. In striking the balance in favor of nondisclosure of intra-governmental advisory and deliberative communications, the privilege subserves a preponderating policy of frank expression and discussion among those upon whom rests the responsibility for making the determinations that enable government to operate, and thus achieves an objective akin to those attained by other privileges more ancient and commonplace in character. Nowhere is the public interest more vitally involved than in the fidelity of the sovereign's decision and policymaking resources.

Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena, 40 F.R.D. 318, 324-325 (D.D.C. 1966), affirmed on the opinion below 384 F.2d 979, cert. denied 389 U.S. 952 (1967). See also 5 U.S.C. § 552(b)(5); Rogers, The Right to Know Government Business From the Viewpoint of the Government Official, 40 Marq.L.Rev. 83, 89 (1956).

This case concerns the ability of the President to enjoy confidentiality in carrying out his official duties. But this important privilege is not one that is available only to assist the functioning of the President, or the Executive Branch generally. As Judge Wilkey recently wrote, "the privilege against disclosure of the decision-making process is a tripartite privilege, because precisely the same privilege in conducting certain aspects of public business exists for the legislative and judicial branches as well as for the executive." Soucie v. David, 448 F.2d 1067, 1080 (1971) (concurring opinion).

Although Professor Arthur Selwyn Miller and a collaborator have recently argued to the contrary, Miller & Sastri, Secrecy and the Supreme Court: On The Need for Piercing the Red Velour Curtain, 22 Buff. L. Rev. 799 (1973), it has always been recognized that judges must be able to confer with their colleagues, and with their law clerks, in circumstances of absolute confidentiality. Justice Brennan has written that Supreme Court conferences are held in "absolute secrecy" for "obvious reasons." Brennan, Working at Justice, in An Autobiography of the Supreme Court 300 (Westin ed. 1963). Justice Frankfurter had said that the "secrecy that envelops the Court's work" is "essential to the effective functioning of the Court." Frankfurter, Mr. Justice Roberts, 104 U.Pa.L.Rev. 311, 313 (1955). And only two years ago Chief Justice Burger analogized the confidentiality of the Court to that of the Executive, and said:

No statute gives this Court express power to establish and enforce the utmost security measures for the

secrecy of our deliberations and records. Yet I have little doubt as to the inherent power of the Court to protect the confidentiality of its internal operations by whatever judicial measures may be required.

New York Times Co. v. United States, 403 U.S. 713, 752 n. 3 (1971) (Burger, C.J. dissenting).

The Judiciary works in conditions of confidentiality and it claims a privilege against giving testimony about the official conduct of judges. Statement of the Judges, 14 F.R.D. 335 (N.D.Cal. 1953). See also the letter of Justice Tom C. Clark, refusing to respond to a subpoena to appear before the House Un-American Activities Committee, on the ground that the "complete independence of the judiciary is necessary to the proper administration of justice." N. Y. Times, Nov. 14, 1953, p. 9.

A similar need for confidentiality, and an insistence that it cannot be breached by other branches of government, applies in the Legislative Branch. Neither a Member of Congress nor his legislative aides can be compelled to disclose communications between the Member and his aides relating to any legislative act of the Member. Gravel v. United States, 408 U.S. 606, 629 (1972). It is immaterial that these communications might show criminal acts. 408 U.S. at 615. These aspects of the Gravel decision reflect in large part acceptance by the Court of the arguments presented by Senator Ervin and seven other Senators on behalf of the Senate as amicus curiae in that case. As reprinted in the Congressional Record, the amicus brief argued in part:

To isolate a Senator so that he cannot call upon the advice, counsel and knowledge of his personal assistants is to stop him from functioning as an independent legislator. If an aide must fear that the advice he offers, the knowledge he has, and the assistance he gives to his Senator may be called into question by the Executive, then he is likely to refrain from acting on those very occasions when the issues are the most controversial and when the Senator is most in need of assistance.

\* \* \*

The Congressional privilege based upon an express Constitutional provision to encourage the free exchange of ideas and information can hardly be less extensive than the Executive privilege which has been

not express statutory or Constitutional basis and whose sole purpose is secrecy. Yet the Executive privilege has been extended to the activities of persons whose relationship to the President is far more remote than the relationship of an aide to a Senator.

The need for protecting the confidential relationships between the President and his aides, as the Government has asserted in defending the Executive privilege, is pari passu applicable to the need for protecting the relationship between Senators and their aides.

Cong. Rec. S5856, S5857 (daily ed. April 11, 1972).

Again it is the long established practice of each House of Congress to regard its own private papers as privileged. No court subpoena is complied with by the Congress or its committees without a vote of the House concerned to turn over the documents. Soucie v. David, 448 F.2d 1067, 1081-1082 (1971). This practice is insisted on in Congress even when the result may be to deny relevant evidence in a criminal proceeding either to the prosecution or to the accused person. 19

- 
- 19 See, e.g., 108 Cong. Rec. 3626 (1962), showing Senate adoption of a resolution permitting staff members and former staff members of a Senate Committee to appear and to testify in a criminal proceeding against James Hoffa but forbidding them from taking any documents or records in the custody of the Senate and from testifying about information that they gained while employed in the Senate. In explaining the resolution to the Senate, Senator McClellan said in part: "The Senate recognizes it has certain privileges as a separate and distinct branch of Government, which it wishes to protect." Id. at 3627.

On July 16, 1970, counsel for 1st Lt. William L. Calley, Jr., moved in his court-martial proceeding for production of testimony concerning the My Lai incident that had been presented to a subcommittee of the House Committee on Armed Services in executive session. Lt. Calley claimed that this testimony would be exculpatory of him and would help him establish his defense in the court-martial. The subcommittee Chairman, Rep. F. Edward Hebert, refused to make the testimony available, advising defense counsel on July 17, 1970, that Congress is "an independent branch of the Government, separate from but equal to the Executive and Judicial branches; and that accordingly only Congress can direct the disclosure of legislative records. He concluded from this that the material requested by the defense was not within the rule of Brady v. Maryland, 373 U.S. 83 (1963), nor subject to the requirements of the Jencks Act, 18 U.S.C. § 3500. Subsequently the military court issued a subpoena to the Clerk of the House of Representatives. The Speaker laid this before the House on November 17, 1970, 116 Cong. Rec. 37652 (1970), but to date the House has taken no action nor given any indication that it will supply the information sought.

These considerations of public policy are particularly compelling when applied to Presidential communications with his advisers.

Inseparable from the modern Presidency, indeed essential to its effective operation, is a whole train of officers and offices that serve him as eyes, ears, arms, mouth, and brain.

Rossiter, The American Presidency 97 (1956). Nor is it only those who are part of his staff with whom the President must be able to talk. He must be able to confer with foreign leaders and with representatives of every element in American public. He must be free to look for advice to anyone whose advice he trusts, whether in or out of government. The late Dean Acheson and former Justice Abe Fortas are merely recent and conspicuous examples of persons who were consulted by Presidents on critical public issues at times that they held no public office. "The President is, as he should be, entirely free, \* \* \* like all who preceded him, to take counsel with private citizens." Id. at 103.

For the Presidency to work effectively and for the President to get candid advice from those to whom he turns it is absolutely essential that he be able to protect the confidentiality of these communications. As stated by the President on July 6, 1973, in his letter to Senator Sam J. Ervin:

No President could function if the private papers of his office, prepared by his personal staff, were open to public scrutiny. Formulation of sound public policy requires that the President and his personal staff be able to communicate among themselves in complete candor, and that their tentative judgments, their exploration of alternatives, and their frank comments on issues and personalities at home and abroad remain confidential.

This has been the position of every President in our history, and it has been specifically stated by President



Nixon's immediate predecessors. Writing his memoirs in 1955, President Truman explained that he had found it necessary to omit certain material, and said: "Some of this material cannot be made available for many years, perhaps for many generations." 1 Truman, Memoirs x (1955). President Eisenhower stated the point with force on July 6, 1955, in connection with the Dixon-Yates controversy:

But when it comes to the conversations that take place between any responsible official and his advisers or exchange of little, mere little slips of this or that, expressing personal opinions on the most confidential basis, those are not subject to investigation by anybody, and if they are, will wreck the Government.

There is no business that could be run if there would be exposed every single thought that an adviser might have, because in the process of reaching an agreed position, there are many, many conflicting opinions to be brought together. And if any commander is going to get the free, unprejudiced opinions of his subordinates, he had better protect what they have to say to him on a confidential basis.

Public Papers of Presidents of the United States: Dwight

D. Eisenhower 1955 674 (1959).

Congress itself recognized the high degree of confidentiality that must attach to Presidential papers for many years when it enacted the Presidential Libraries Act of 1955, Pub. L. 84-373, 69 Stat. 695 (1955), now codified in 44 U.S.C. §§ 2107, 2108. That statute encourages Presidents to give their papers to a Presidential library, and provides that papers, documents, and other historical materials so given "are subject to restrictions as to their availability and use stated in writing by the donors or depositors\*\* \*.

The restrictions shall be respected for the period stated, or until revoked or terminated by the donors or depositors or by persons legally qualified to act on their behalf." 44 U.S.C. § 2108(c); Nichols v. United States, 460 F.2d 671 (10th Cir. 1972). Since that Act was passed the gifts

of Presidential papers of Presidents Eisenhower, Kennedy, and Johnson have all specified that "materials containing statements made by or to" the President are to be kept "in confidence" and are to be held under seal and not revealed to anyone except the donors or archival personnel until "the passage of time or other circumstances no longer require such materials being kept under restriction."

Letter of April 13, 1960, from President Dwight D.

Eisenhower to the Administrator of General Services;

Agreement of Feb. 25, 1965, between Mrs. Jacqueline B.

Kennedy and the United States; Letter of Aug. 13, 1965,

from President Lyndon B. Johnson to the Administrator of

General Services. In addition, the letters from President

Eisenhower and from President Johnson specifically prohibit

disclosure to "public officials" and state, as the reason

for these restrictions, that "the President of the United

States is the recipient of many confidences from others,

and \* \* \* the inviolability of such confidence is essential

to the functioning of the constitutional office of the

Presidency \* \* \*."

The need to preserve the confidentiality of the Oval Office has been recognized from without as well as by those who have borne the burdens of service there. What Justice Stewart, who was joined by Justice White, said in his concurring opinion in New York Times Co. v. United States, 403 U.S. 713, 727 (1971), has great force:

And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. \* \* \*

\* \* \* [I]t is clear to me that it is the constitutional duty of the Executive -- as a matter of sovereign prerogative and not as a matter of law as the courts know law -- through the promulgation and enforcement

of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.

403 U.S. at 728, 729-730.

Of course international relations and national defense have very special claims to secrecy, but the importance of the President being able to speak with his advisers "freely, frankly, and in confidence" is not confined to those matters. It is just as essential that the President be able to talk openly with his advisers about domestic issues as about military or foreign affairs. The wisdom that free discussion provides is as vital in fighting inflation, in choosing Supreme Court Justices, in deciding whether to veto a large spending bill, and in the myriad other important decisions that the President must make in his roles as Chief of State, Chief Executive, and Chief Legislator as it is when he is acting as Chief Diplomat or as Commander in Chief. Any other view would fragment the executive power vested in him and would assume that some of his Constitutional responsibilities are more important than others. It is true that the President has more substantive freedom to act in foreign and military affairs than he does in domestic affairs, but his need for candid advice is no different in the one situation than in the other.<sup>20</sup>

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There are serious weaknesses in the assumption, popular among liberals who happen at the moment not to be thinking about Senator McCarthy, that public policy ought to draw a sharp distinction between "military and diplomatic secrets" on the one hand and all other types of official information on the other, giving Congress free access to the latter. In the first place, the line is by no means easy to draw, even when the best of faith is used \* \* \*. More fundamentally, however, the executive's interest in the privacy of certain other types of information is not less than its interest in preserving its military and diplomatic secrets. One obvious example is the data, derogatory or otherwise, in the security files of individuals. Another, perhaps still more important, is the record of deliberations incidental to the making of policy decisions.

Bishop, The Executive's Right of Privacy: An Unresolved Constitutional Question, 66 Yale L. J. 477, 488 (1957).

Former Justice Fortas, who advised President Johnson on both foreign and domestic matters, has said that a President must have "confidence that he can have advisers to whom he can trust his inmost thoughts. A President has to have this, just as a citizen can go to a doctor or a lawyer, a priest or a psychiatrist, to discuss his problems, without fear of disclosure of his confidences." Fortas, The Presidency As I have Seen It, In Hughes, The Living Presidency 335 (1973).<sup>21</sup>

All that we have said on this point was succinctly put by a distinguished Constitutional lawyer, Charles L. Black, Jr., who has recently observed that refusal to disclose communications of the kind involved in this litigation is not only the President's lawful privilege, but

It is hard for me to see how any person of common sense could think that those consultative and decisional processes that are the essence of the Presidency could be carried on to any good effect, if every participant spoke or wrote in continual awareness that at any moment any Congressional committee, or any prosecutor working with a grand jury, could at will command the production of the verbatim record of every word written or spoken.

- 
- 21 This need has been perceived also by political scientists.

Although some of President Truman's "cronies" were poorly equipped for this service, their indiscretions did not destroy a President's need for personal adviser's \* \* \*. There can be no doubt that men like House and Hopkins perform an essential function. Ideally, they are both intimates of the President and experts in public affairs. But perhaps their most significant contributions are made as presidential intimates. The President needs to discuss with a sympathetic person ideas and plans that are still in an amorphous state and to gain some respite from the cares of office by talking over trivial matters that interest him or by chatting about men of affairs, with the confidence that his remarks will not go beyond the room.

Carr, Bernstein, Morrison, Snyder, & McLean, American Democracy in Theory and Practice 609-610 (1956).

Black, Mr. Nixon, the Tapes and Common Sense, N. Y. Times, Aug. 3, 1973, p. 31. See also the fuller expression of Professor Black's view in Cong. Rec. E5320-E5322 (daily ed. August 1, 1973).

What we have said in this portion of the brief is frequently put on the basis of separation of powers. Yet it is probable that the point we have made goes beyond the separation of powers arguments and rests on a proposition even more fundamental. Even though no separation of powers issue would be involved, we suggest that it would be as inadmissible for one federal court to inquire into discussions between a judge of another federal court and his law clerk as it would be if the inquiry were to come from a committee of Congress. Similarly, we cannot conceive that one Congressional committee could require production of the private papers of another Congressional committee any more than a court could require these. What is really at stake is the ability of Constitutional officers of government to perform their duties under conditions that will make it possible for them to function to the best of their ability. For this goal to be achieved, the ability to preserve the confidentiality of communications with close advisers is absolutely essential.

#### VIII. Conclusion

One noteworthy characteristic of the plaintiffs' argument is its candor. Few words are minced in delineating the central purpose of this proceeding: to discover evidence from the President's records, indeed from his own private conversations, that might establish Presidential complicity in the commission of serious crimes. Objections to legislative inquiry into the

innocence or guilt of individuals are formidable in any case. There is, we submit, a categorical bar to compulsory process designed to elicit evidence of criminal conduct on the part of the President of the United States, for he is answerable in only one Constitutional proceeding. That proceeding requires the deliberate action of the whole Congress under the Impeachment Clause, not the filing of a discretionary suit by a Select Committee of the Senate under a general enabling resolution.

In the related litigation to compel production of certain of the Presidential recordings, the argument of the Special Prosecutor and the relief granted by this Court both acknowledged and were at pains in attempting to preserve the right of confidentiality upon which the functioning of the Presidency crucially depends. We do not believe the decision in that case can stand because we do not believe the President's responsibility and power to make Presidential judgments can be vested in the Judiciary, no matter how limited or verbally hedged the infringement of power may be.

This case, however, involves much greater steps toward dissolution of the lines that separate the co-equal branches of our Constitutional system. It is a commentary on the infectious spirit of Watergate that the pending action, deriving whatever strength it has from this Court's earlier decision, threatens such a rapid reduction in an historically protected area of Presidential power. The most damaging of the consequences that we warn against in the related litigation would be, quite literally, upon us if the relief sought by the plaintiffs in this case were to be granted and sustained.

But if the plaintiffs' arguments are a commentary on the spirit of Watergate, the limits on this proceeding are a commentary on the inherent wisdom of the rules governing the jurisdiction of federal courts. For as previously noted by

the Court, the question of jurisdiction is indeed "a most important question in this case." (Tr. Hearing of Sept. 6, 1973, p. 11) And as shown by this submission the plaintiffs must overcome a number of jurisdictional objections if they are to obtain the requested relief. They must establish:

- (a) That the matter is a justiciable case or controversy and not essentially a political question;
- (b) That the claim falls within a specific statutory grant of subject matter jurisdiction;
- (c) That the court has in personam jurisdiction over the President;
- (d) That the Committee is performing a valid legislative function in subpoenaing tape recordings of confidential Presidential conversations; and
- (e) That the Committee is not exceeding the scope of its authority under Senate Resolution 60.

It is obvious, but bears emphasis, that the failure of plaintiffs to meet any one of these jurisdictional objections is fatal to their claim. Far from discharging the cumulative burden of answering each and every one of these objections, plaintiffs have failed to satisfactorily answer any of them.

For all of the foregoing reasons, judgment should be entered on behalf of the President.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas P. Marinis, Jr., hereby certify that on the 24th day of September, 1973, copies of the foregoing Brief in Opposition to Plaintiffs' Motion for Summary Judgment were hand-delivered to the office of

Samuel Dash, Esq.  
Chief Counsel  
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on Presidential Campaign Activities  
United States Senate  
Washington, D.C. 20510

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Thomas P. Marinis, Jr.



THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

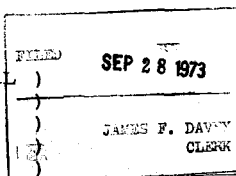
SENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES, et al

Plaintiffs

v.

RICHARD M. NIXON,  
individually and as President of the United States

Defendant



Civil Action  
No. 1593-73

PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF  
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Exhibit: Letter of September 11, 1973, from Henry E. Petersen, Assistant Attorney General, to Richard H. Ichord, Chairman of Committee on Internal Security, House of Representatives.	

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL	)	
CAMPAIGN ACTIVITIES, et al.	)	
	)	
<u>Plaintiffs</u>	)	
	)	
v.	)	Civil Action
	)	No. 1593-73
RICHARD M. NIXON, individually and as	)	
President of the United States	)	
	)	
<u>Defendant</u>	)	

PLAINTIFFS' REPLY MEMORANDUM IN  
SUPPORT OF MOTION FOR SUMMARY  
JUDGMENT

---

This memorandum responds, with as much brevity as is possible, to defendant President's Brief in Opposition to Plaintiffs' Motion for Summary Judgment. We detail below the specific areas where we take issue with the President, but a few initial observations are in order.

First, the President does not dispute any of the facts set forth in plaintiffs' Statement Of Material Facts As To Which There Is No Genuine Issue. Accordingly, these facts are established for the purposes of this motion and, no factual dispute appearing, the case is ripe for summary judgment. See Rule 56 (e), F.R. Civ. P. and Local Rule 1-9 (g).

Second, the President's Brief almost totally ignores this Court's ruling in Misc. No. 47-73 which, as formerly noted (Supp. Mem, 1-2)\*, effectively resolves many of the fundamental issues in the present case. Likewise largely ignored is plaintiffs' central contention that executive privilege cannot be used to suppress evidence that bears on the President's

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\*/ Supp. Mem. refers to "Supplementary Memorandum in Support of Plaintiff's Motion for Summary Judgment" filed by the Select Committee on September 18, 1973.

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own criminality, a proposition the President's counsel cannot dispute and have elsewhere conceded. Further, the Brief in Opposition nearly overlooks plaintiffs' argument that the President has completely waived any claim of confidentiality he may have had regarding the materials under subpoena.

Instead, the President's counsel focus mainly on technical and jurisdictional objections to this suit in order to avoid an adverse decision on the merits. These objections are without merit and fail to meet our previous showing (Supp. Mem.) that the merits of this case are properly before the court and must be decided in the Committee's favor.

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# I. The Committee's Suit is Fully Justiciable

The Brief in Opposition argues at length (pp. 10-21) that the Committee's suit is nonjusticiable because courts are impotent to pass on the issue of executive privilege. Stripped of rhetoric, this argument rests on the bald assertion by the President of an "exclusive and unreviewable power" to invoke such privilege (Br. 16). That assertion ignores the controlling decisions of the Supreme Court and the Court of Appeals for this Circuit, as well as this Court's ruling in Misc. No. 47-73.

If it were indeed true that the President enjoyed the "exclusive and unreviewable power" of executive privilege which he claims, there would be considerable merit in the argument that the present suit is nonjusticiable. But as we have already shown (Mem. 8-10), <sup>\*/</sup> the law is otherwise. Thus in Reynolds v. United States, 345 U.S. 1 (1953), the Supreme Court held that the "court itself must determine whether the circumstances are appropriate for the claim of executive privilege," because "judicial control" over evidence "cannot be abdicated to the caprice of executive officers." 345 U.S. at 8, 9-10. This principle was reiterated by the Court of Appeals for this Circuit in Committee for Nuclear Responsibility v. Seaborg, 149 U.S. App. D.C. 385, 388-89, 463 F.2d 788, 791-92, (1971), which flatly rejected the claim of absolute executive privilege to withhold communications to the President. In its decision in Misc. No. 47-73, this Court recognized and reaffirmed the power of the Judiciary to pass on claims of executive privilege, holding that the "availability of evidence including the validity and scope of privileges, is a judicial decision" and that "Executive fiat is not the mode of resolution." (Op. 5, 6.) <sup>\*\*/</sup>

<sup>\*/</sup> "Mem." refers to the "Memorandum of Points and Authorities in Support of Motion for Summary Judgment" filed by the Select Committee on August 29, 1973.

<sup>\*\*/</sup> "Op. \_\_\_" refers to Opinion, Misc. No. 47-73.

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Following this Court's adverse ruling in Misc. No. 47-73, counsel for defendant President have scoured the text of the Constitution in a belated effort to prop up their discredited claim of unreviewable executive privilege. Invoking the test of Powell v. McCormack, 395 U.S. 486, 519 (1969), their Brief asserts that a "textually demonstrable commitment" to the Executive of unreviewable privilege may be found in the constitutional provisions requiring the President to take "Care that the Laws be faithfully executed " and to give "Congress Information of the State of the Union," and in the provisions vesting "executive power" in the President and empowering him to require the "Opinion in writing of the principal Officer in each of the executive Departments" on official matters (Br. 15, <sup>\*/</sup>13).

These provisions fall far short of meeting the exacting test of a "textually demonstrable commitment of the issue to a coordinate political department " which Powell held is necessary to insulate a matter from <sup>\*\*/</sup>judicial review. None of these provisions so much as mentions secrecy, or invests the President with an evidentiary privilege similar to that accorded Congress under the Speech and Debate Clause. It is fatuous to argue for example, that a provision requiring the President

\*/ Each of these arguments would apply equally to the Special Prosecutor's case, yet defendant President does not explain why they are asserted solely as a bar to the Committee's suit. Moreover, these efforts to show a "textually demonstrable commitment" of unreviewable prerogative to the Executive Branch are inconsistent with the subsequent admission in their Brief (p. 55) that "the doctrine of separation of powers is not contained in express language in the Constitution." ("Br.       " refers to "Brief of Richard M. Nixon in Opposition to Plaintiffs' Motion for Summary Judgment" filed by the defendant President on September 24, 1973.)

\*\*/ In Powell, the Court refused to find that the constitutional provision making each House "the Judge of the ... Qualification of its own Members" constitutes a "textually demonstrable commitment" to each House of power to exclude members for official misconduct.

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to furnish Congress information on the State of the Union is authority <sup>\*/</sup> to withhold information from Congress, or that the President's duty faithfully to execute the laws empowers him to suppress evidence of Executive lawbreaking. Such arguments amount to nothing more than a last-ditch grasping at verbal straws. In the face of controlling decisions such as Reynolds and Soucie v. David, 448 F. 2d 1067 (1971), as well as this Court's decision in Misc. No. 47-73, they are unavailing. The Constitution neither explicitly nor implicitly vests the President with an <sup>\*\*/</sup> unreviewable prerogative of executive privilege.

<sup>\*/</sup> See R. Berger, Executive Privilege v. Congressional Inquiry, 12 U. C. L. A. L. Rev. 1044, 1076-77 (1965).

<sup>\*\*/</sup> As Powell makes clear, the existence of a "textually demonstrable commitment to a coordinate branch" is the central factor in determining whether a controversy such as this is nonjusticiable. While the Brief in Opposition also relies on other features of the "political question" doctrine in an effort to bar this suit, Powell casts doubt on the relevance of these other considerations if a "textually demonstrable" commitment is lacking. Moreover, Powell also demonstrates that these other features are not present here.

It is asserted (Br. 18, 16) that the present suit is nonjusticiable because it may create "a potentially embarrassing confrontation between coordinate branches," and involves an "initial policy determination of a kind clearly for nonjudicial discretion." But, as in Powell:

"[D]ecision of the present case would require no more than an interpretation of the Constitution. Such a determination falls within the traditional role accorded courts to interpret the law, and does not involve a 'lack of the respect to [a] co-ordinate [branch] of government, nor does it involve an initial policy determination of a kind clearly for non-judicial discretion.' Baker v. Carr, 369 U. S. 186, at 217. Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." 395 U. S. at 548-549.

It is also asserted that the issue at bar raises the possibility of "multifarious pronouncements" by various departments on the same question (Br. in 21), but, as Powell teaches, this possibility cannot arise because "it is the responsibility of [the judiciary] to act as the ultimate interpreter of the Constitution. Marbury v. Madison, 1 Cranch. 137 (1803) 395 U. S. at 549.

(Footnote continued on the following page.)

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The Brief in Opposition also contends (p. 20) that the Court is impotent to decide this controversy because it involves a "clash of power between two branches of government" and that to "resolve the confrontation the Court must necessarily declare that one power is greater than its counterpart." Again, this argument simply disregards and is flatly contradicted by the controlling authorities discussed in our Memorandum (pp. 6-7), as well as this Court's decision in Misc. No. 47-73.

Thus, in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), the Supreme Court held that the President's seizure of the nation's steel mills unconstitutionally invaded the legislative powers of Congress. In Myers v. United States, 272 U.S. 52 (1926) and United States v. Lovett, 328 U.S. 303 (1946), the Court accepted the Executive's contention that Congress had exceeded its constitutional powers. See also, Humphrey's Executor (Rathbun) v. United States, 295 U.S. 602 (1935), (congressional statute held to bar asserted constitutional removal power of President); The Pocket Veto Case, 219 U.S. 655 (1924) (congressional challenge to constitutionality of pocket veto rejected). Each of these cases involved a "clash of power between two branches of government" yet in each of them the Supreme Court displayed no hesitation in declaring that "one power" was "greater than its counterpart" with respect to the matter in controversy.

(Footnote continued from preceeding page.)

Contrary to defendant's assertion (Br. 17), there are "judicially discernible and manageable standards" for resolving the present controversy. As Reynolds, Soucie, and the other authorities cited in our initial memorandum (pp. 8-10, 21-27) demonstrate, the courts have long passed on claims of executive privilege and developed standards to assess their validity.

Finally, it is asserted (Br. 19-20) that the present controversy is nonjusticiable because the courts lack physical power to enforce process against the President. In Misc. No. 47-73 this Court properly rejected this extraordinary claim. Moreover, the President's contentions on this score ignore the fact that the Committee at this juncture seeks only a declaratory judgment. Powell demonstrates that a declaratory judgment is a wholly proper form of relief in circumstances such as this, and we do not understand the Brief in Opposition's learned but inconclusive discussion of declaratory judgment principles (pp. 4-7) to argue otherwise.



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In Misc. No. 47-73 this Court likewise dealt with and resolved a "clash of power between two branches of government"--a clash between the President as a representative of the Executive Branch and the Grand Jury as a representative of the Judicial Branch. In all of these cases, the Court was simply discharging its proper responsibility as the "ultimate interpreter of the Constitution." Powell v. McCormack, 395 U.S. 486 (1969). The same responsibility empowers and indeed obligates the Court to hear this case.

The defendant President's arguments regarding justiciability appear ultimately to be based on a theory of a "water-tight" division of functions between the respective branches. But as this Court pointed out in Misc. No. 47-73 (Op. II), the intention of the Framers was otherwise. In the circumstances of this case, it is also appropriate to recall the words of Mr. Justice Brandeis:

"The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."<sup>\*/</sup>

The President has stated that (Br. 16), the only possible alternative to judicial resolution of this controversy is an impeachment proceeding. But, as this Court asserted in Misc. No. 47-73, impeachment "is not so designed that it can function as a deterrent in any but the most excessive cases" and that in many situations "impeachment is not a reasonable solution" (Op. 6 n. 9). As a practical matter, if impeachment were the sole safeguard against Executive abuses of power, the Executive would enjoy broad license to violate the law. Decisions such as

<sup>\*/</sup> Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting)

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Youngstown Sheet & Tube Co. v. Sawyer, supra, demonstrate that the principle of our Constitution is otherwise. The President, like all other executive officers, is subject to the rule of law as applied by the courts. In this Court's words, the President is not a sacrosanct "fourth branch of government" (Misc. 47-73, Op. 10). Accordingly, this controversy is fully justiciable.<sup>\*/</sup>

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<sup>\*/</sup> This Court's decision in Misc. No. 47-73 fully disposes of defendant President's claim (Br. 35-37) that the courts lack jurisdiction to entertain any proceeding brought against the President in his official capacity. The cases cited in the Brief in Opposition do not support an absolute immunity of the President from suit, but merely hold that the courts should not entertain frivolous actions against the President or interfere with the President's exercise of discretionary powers. This Court held in Misc. No. 47-73 that the President's obligation to respond to a lawfully issued subpoena does not involve any "discretionary functions" and is "something more akin to a ministerial duty if it concerns official duties at all." (Op. 10.) This conclusion is a complete answer to defendant President's reliance on the decision in *Marbury v. Madison* (Br. 11), which merely suggests that courts are without power to interfere with the President's discretionary "political" responsibilities, and also casts doubt on the claim (Br. 35) that official presidential duties are involved here.

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II. The Committee, in Investigating and Exposing Criminality in the Executive Branch, Is Acting Fully within its Powers under the Constitution and its Enabling Resolution.

The defendant President contends that the Committee's investigative and litigative activities go beyond the bounds allowed by the Constitution and S. Res. 60. This claim is demonstrably erroneous and must be rejected.

A. Constitutional Requirements

The President admits that " the power of the Congress to conduct investigations is inherent in the legislative process and is broad" (Br. 38), and that "the Senate is authorized to investigate campaign practices to see if legislation is needed in that area." (Br. 44). But he contends (Br. 37-45) that the Committee's investigation is unconstitutional because, in seeking to ascertain all relevant facts, it is conducting a criminal trial, usurping judicial power, and acting without a valid legislative purpose. We need not repeat all that was said in our Supplemental Memorandum (pp. 4-7) respecting the right of congressional committees to investigate criminal conduct, particularly in the executive branch. A few comments as to the Committee's legislative purpose are nonetheless in order.

First, as held in McGrain v. Daugherty, 273 U.S. 135, 178 (1927), and subsequent Supreme Court decisions, \*/ there is a presumption that a congressional committee is acting with a valid legislative purpose. This presumption is not dispelled by the fact that this Committee has been diligent and scrupulous in exploring the full extent of the executive corruption which it is authorized to investigate for purposes of considering the need for corrective legislation.

Second, significant legislative goals are served by the Committee's efforts to determine the involvement of the President and his subordinates

\*/ Barenblatt v. United States, 360 U.S. 109, 133 (1959); Watkins v. United States, 354 U. S. 178, 200 (1957).

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in the Watergate affair. If the President was involved in criminality relating to the 1972 campaign and election, drastic legislative remedies may be appropriate. The Committee, for example, might recommend that presidential tenure be limited to one term and that the participation of the President in the campaign to choose his successor be restricted. If the President was involved in illegalities respecting the ITT affair <sup>\*/</sup> or other campaign financing schemes that have surfaced, the Committee might recommend a radically new campaign financing system that would rule out private contributions and provide that support for presidential campaigns come solely from public monies. In light of these and other examples that could be furnished, it is erroneous to contend that the Committee does not have any valid legislative ends in view, and it is even more erroneous to assert that the presumption to that effect has been overcome. It would simply be folly to proceed to the enactment of far-reaching legislation in the crucial area of presidential campaigns without knowing all the key facts<sup>\*\*</sup>

There is another legislative purpose fulfilled by thorough investigation. To be enacted, a bill--especially one that may suggest drastic revisions in the conduct of presidential campaigns--needs widespread public support. Such support can best be gained by revealing to the public the extent of corruption in the last presidential campaign and election. When this factor is considered along with the Committee's legislative mission and the recognition that Congress has a duty to inform the public of corruption in high administrative places, the President's claim that the

<sup>\*/</sup> See the Colson to Haldeman memorandum dated March 30, 1972, attached to Plaintiffs' Statement of Material Facts As To Which There Is No Genuine Issue.

<sup>\*\*/</sup> Concerning the importance of the materials subpoenaed to the Committee's investigation, see the affidavit of Senator Ervin attached to our Supplemental Memorandum.

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Committee is attempting "to expose for the sake of exposure" becomes untenable. See Watkins v. United States, 354 U.S. 178, 200 (1957).<sup>\*/</sup>

Thus, as was the case regarding the congressional committees investigating the Teapot Dome scandal, whose activities were sustained in McGrain v. Daugherty, supra and Sinclair v. United States, 279 U.S. 203 (1929), the plaintiff committee is performing legitimate legislative functions. In no way is it conducting a criminal trial or otherwise trampling on the preserve of the judiciary. <sup>\*\*/</sup>

#### B. The Enabling Resolution

The President's assertion that the Committee's resolution gives it no power to subpoena or sue him likewise evaporates when subjected to even casual scrutiny.<sup>\*\*\*/</sup>

The President contends that "it is beyond belief that any member of

<sup>\*/</sup> Watkins condemned such conduct regarding the investigation of a private individual. It is not clear that Congress lacks power to expose executive corruption solely for the sake of exposure; indeed, Watkins suggests that such activity is proper. But the Court need not decide this issue because the Committee's investigation here plainly serves other valid legislative purposes. See further Barenblatt v. United States, supra at 132, 133, which indicates that the "motives" of congressmen in investigatory proceedings may not be dissected to determine the existence of a valid legislative purpose.

Kilbourn v. Thompson, 103 U.S. 168 (1880), relied on heavily by plaintiffs (Br. 40-41) also involved an investigation into private conduct. It is not convincing to suggest that Kilbourn, which, for lack of proper legislative purpose, condemned an investigation into a private real estate pool, is controlling where the investigation under consideration concerns a presidential election, a subject that is indisputedly the subject of proper legislative concern.

<sup>\*\*/</sup> We believe this Court has already recognized that the Committee is engaged in constitutional activity. During argument in Misc. No. 70-73 on May 16, 1973, as to whether G. Gordon Liddy would be compelled to testify under a grant of immunity, the Court (Tr. at p. 13) made the following observation:

"Here he [Liddy] is asked to come before a duly constituted Committee of the Senate which is conducting an investigation and one of the principal purposes of that investigation as I understand it is to find out what occurred in this situation, this matter, and if necessary recommend remedial legislation to the Congress to correct any evil that they might uncover. That is usually the purpose of every investigation of that Committee."

<sup>\*\*\*/</sup> We will not repeat in detail our contention (Supp. Mem. 8) that the President has waived his right to claim that the Committee lacks authority under S. Res. 60 to subpoena him, but we do note that his Brief failed to deal with our argument in this regard.

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the Senate, when voting to authorize the Select Committee to direct subpoenas to an 'officer', had any thought that he was voting to empower the committee to take the unprecedented and unauthorized action that has led to the present litigation." (Br. 48). Yet such hyperbole cannot obscure the fact that S. Res. 60 was specifically passed to allow the Committee to investigate the 1972 presidential campaign and election and the conduct of the candidates therein--one of whom was the defendant President--and was enacted in an atmosphere of widespread speculation regarding the President's own involvement in Watergate. It would thus be blinking reality to read S. Res. 60--which hardly could be drawn in broader language--to exclude the issuance of subpoenas to one of the principal persons being investigated. <sup>\*</sup>/

In addition, as previously shown (Supp. Mem. pp. 9-11), the legislative history of S. Res. 60 demonstrates that subpoenas to the President were envisioned. Senator Scott, for example, observed that S. Res. 60 embodied "the widest possible power" to secure evidence from the executive. 119 Cong. Rec. at 2320 (1973). This history does not square with the President's claims that presidential subpoenas were wholly foreign to the thoughts of the unanimous Senate that passed S. Res. 60.

Moreover, the Senate, by unanimously voting an additional appropriation of \$500,000 to the Committee just two days after the subpoenas were issued to the President, registered its tacit approval of the Committee's

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<sup>\*</sup>/ The President's counsel fail to meet our point that, since S. Res. 60 specifically and repeatedly refers to "the office of the President of the United States" (e.g. § 1 (a) ), the language in § 3 (a) (5) allowing subpoenas to any "officer . . . of the executive branch" must be interpreted to authorize subpoenas to the President.

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subpenas. Berk v. Laird, 429 F.2d. 302, 305 (2d Cir. 1970); See Shelton v. United States 133 U. S. App. D. C. 315, 404 F.2d 1292 (1968). \*/

The claim that the Committee must seek authority from the Senate to sue to enforce its subpenas is of the flimsiest fabric. Section 3 (a) (6) of S. Res. 60 empowers the Committee to "make to the Senate any recommendations it deems appropriate" in respect to the willful failure or refusal of any person to comply with its subpenas, \*\*/ thus giving it total discretion whether or not to seek Senate approval before instituting litigation. Try as they may, the President's counsel cannot contort the words of this section to require full Senate approval for litigation. The discretionary nature of this section is in complete accord with the provisions of S. Res. 262, which give this Committee full authority to sue to enforce its subpenas without referral of the matter to the full Senate; there is no ground to read any part of S. Res. 60 as denigrating the unrestricted authority to sue found in S. Res. 262. \*\*\*/

\*/ The subpoena attached to the complaint as exhibit D is narrowly circumscribed, rather than overbroad, as defendant President contends (Br. 50). It calls only for materials that relate to the criminal activities of twenty-five named individuals in connection with the 1972 presidential campaign and election. It thus embodies a practical time limitation and refers to a narrow subject matter. The assertion (Br. 50) that it relates to "a number of different subjects" and "would require a complete review of virtually all records in the White House" is either very overblown or very disturbing. Also, as noted (Supp. Mem. 9n.), the subpoena is as precise as it can be in the circumstances and is valid even if it requires substantial production. We are confident that counsel for the parties can arrive at a reasonable solution for compliance with the subpoena if this Court determines it must be honored.

\*\*/ As noted (Supp. Mem. 12) the Committee might, for example, desire to make recommendations to the full Senate if criminal contempt proceedings were contemplated.

\*\*\*/ Counsel for the President err in contending (Br. 49), that "h/eretofore no Committee of Congress has asked the courts to enforce a subpoena for it." That is precisely what occurred in Reed v. County Commissioners 277 U.S. 376 (1928), which provoked the passage of S. Res. 262, and in In Re Hearings by the Committee on Banking and Currency, 19 F.R.D. 410 (N.D. Ill. 1956). In neither instance did the committee seek Senate approval to instigate suit.

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### III. The Court Has Jurisdiction Over This Controversy

The Brief in Opposition objects to each of the statutory and constitutional bases of jurisdiction upon which plaintiffs rest this action. To dismiss this suit for want of jurisdiction, the Court must find that none of these jurisdictional provisions is applicable, but the President's counsel, we believe, have failed to demonstrate that any one of these jurisdictional bases is inapposite.

§ 1331. The Brief in Opposition addresses the question of jurisdictional amount in a grudging spirit that is at odds with the law. As we have pointed out (Supp. Mem. 14), it is settled that once a good faith assertion has been made that a claim involves the requisite jurisdictional amount, "it must appear to a legal certainty that the claim is less than a jurisdictional amount to justify dismissal." St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288-289 (1938).

The attempt to dismiss plaintiffs' claim of jurisdictional amount as a "bald assertion" (Br. 22) is without merit. Chairman Ervin's affidavit carefully details the direct monetary value to the Committee of compliance with its subpoenas. The Brief in Opposition makes no effort whatever to contradict the various factual assertions in this affidavit, which must therefore be accepted as true. The attempt to brush aside the costs to the Committee of noncompliance with its subpoenas as incidental and immaterial (Br. 24) is likewise unavailing. The costs to the Committee of noncompliance with its subpoenas are simply the mirror image of the costs of compliance with assertedly invalid governmental orders, and it is settled that such costs may satisfy the jurisdictional amount requirement (Supp. Mem. 17).<sup>#</sup>

<sup>#</sup>By contrast, the cases cited by the defendant President on this score (Br. 25) deal only with the assertion of collateral economic effects from denial of the claim such as, in the Elgin v. Marshall and Healy v. Ratta cases, the effect of a judgment upon other litigation, and not with the direct costs to the plaintiff of carrying out, as in the present case, prescribed responsibilities.



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In the words of Kheel v. New York Port Authority, 457 F.2d 46, 49 (2d Cir. 1972), relied upon by the President (Br. 23-24), the additional cost to the Committee "flows directly and with a fair degree of probability" from the outcome of this litigation.

Moreover, the Brief in Opposition fails to deal with the consistent decisional precedent (Supp. Mem. 18 n. \*) holding that the official duties and rights of legislators are susceptible of monetary valuation and provide a completely adequate basis for establishing the jurisdictional amount. We have cited several cases where legislators' rights and duties have been held to be of sufficient worth to satisfy the jurisdictional amount requirements; the President's counsel are unable to cite a single decision where a court has rejected a legislator's action on the ground that the requisite jurisdictional amount was missing. \*/

§ 1345 The Brief in Opposition appears to misunderstand both our claim to jurisdiction under § 1345 and the requirements of that provision. Section 1345 provides as follows:

"Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

As the placement of the comma after the words "United States" indicates, this section distinguishes two classes of plaintiffs: the "United States" and "any agency or officer thereof expressly authorized to sue by Act of Congress."

\*Defendant President dismisses the third predicate we have suggested for meeting the jurisdictional amount requirement -- the "defendant's viewpoint" approach -- with the statement that "it need not be dignified with a response." (Br. 25, n. 4). But our position in this regard is supported not only by the authorities cited in our Supplemental Memorandum but also by the Court of Appeals decision in Ronzio v. Denver & Rio Grande Western R., 116 F.2d 604 (10th Cir. 1940). See also Wright, Law of Federal Courts, 118-119 (2d ed. 1970) where the author observes that the "desirable rule" allows consideration of the worth of the suit to the defendant in the jurisdictional amount determination because "the purpose of a jurisdictional amount, to keep trivial cases away from the court, is satisfied where the case is worth a large sum to either party." We also note that the President's counsel do not dispute that the outcome of this case is of considerable importance to the President.

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As made clear in our Supplemental Memorandum (pp. 20-21), the Committee, as the duly authorized agent of the Senate, brings this suit in the name of and on behalf of the United States. #/ Since the requirement of authorization by Act of Congress does not apply to suits by the United States, there is no merit in defendant President's contention that an Act of Congress is required to authorize this action. \*\*/

There is likewise no merit in defendant President's claim that 28 U.S.C. § 516 requires a congressional litigant to be represented by the Justice Department. The statute is an executive housekeeping provision designed to govern relations between the various executive agencies, the United States Attorneys, and the Attorney General (Supp. Mem. 22 n. \*\*), and has never been held to apply to congressional litigation. As Assistant Attorney General Petersen recently acknowledged in a September 11, 1973, letter to Representative Ichord (attached hereto as an exhibit):

"While there is no statutory authority for the representation of Congressional committees by the Department of Justice such representation has, of course, been traditional. However, as you are also aware, there is substantial precedent for Congress' hiring private counsel, particularly in cases where the legal issues to be explored by the litigation raises the possibility of conflict with the positions taken by the Department of Justice or other parts of the executive branch in other litigation." Exhibit, p.3.

Article III The Brief in Opposition (pp. 10-21) challenges jurisdiction under Article III of the Constitution, asserting that the decisions we have cited for the government's authority to sue under that Article are all cases where the courts predicated jurisdiction on a statutory basis, 28 U.S.C. § 1345. But the President's counsel misread these decisions, especially

\*Plaintiffs do not seek to bring suit as an "agency or officer" of the United States.

\*\*/ See United States v. Shanks, 384 F.2d 924 (10th Cir. 1967); United States v. Fabric Garment, Inc., 366 F.2d 530 (2d Cir. 1966); United States v. Desert Gold Mining Co., 433 F.2d 713 (9th Cir. 1970).

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In re Debs, 158 U.S. 564 (1895), and The New York Times Co. v. United States, 403 U.S. 713 (1971) which indicate a jurisdictional base in Article III independent of any statutory provision. We refer the Court to our previous discussion of these decisions (Supp. Mem. 22).

§ 1361 We agree with the President's counsel (Br. 31 ) that for jurisdiction to lie under 28 U.S.C. § 1361 there must be a colorable claim of ministerial duty owed by the President. However, this Court ruled in Misc. 47-73 that the President's duty to comply with a proper subpoena is ministerial in character (Op. p.10, n.21). While that ruling was made in the context of a grand jury subpoena, we have shown (Mem. 17; Supp. Mem. 6-7) that the duty to comply with congressional subpoenas is at least equally compelling. The plaintiffs have certainly made a colorable (and, we believe, irrefutable) claim that the defendant President owes a ministerial duty to produce the evidence demanded, and § 1361 therefore affords jurisdiction.

Administrative Procedure Act Three points should be stressed with respect to the President's challenge to the plaintiffs' jurisdiction under the Administrative Procedure Act (APA).

First, this Circuit has held in Independent Broker-Dealers Trade Association v. SEC, 142 U.S. App. D.C. 383, 442 F.2d 132, cert. denied, 404 U.S. 828 (1972), that the APA embodies an independent conferral of federal jurisdiction, and thus has effectively overruled its earlier rulings in Almour v. Pace, 90 U.S. App. D.C. 63, 193 F.2d 699 (1951) and Kansas City Power & Light Co. v. McKay, 96 U.S. App. D.C. 273, 281-282, 225 F.2d 924, 932-933 (1955) upon which the Brief in Opposition relies heavily (p. 34).\*/

\*While the circuits are split over the issue, there are strong dicta in several Supreme Court decisions, particularly Rusk v. Cort, 369 U.S. 367 (1962) and Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), which support the position taken by this Circuit in the Independent Broker-Dealers case. (Footnote continued on following page.)

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Second, "agency action" for purposes of jurisdiction under the APA is not, as suggested in the Brief in Opposition (p. 33), limited to rulemaking and adjudication in the traditional sense. As the decisional law makes clear, other forms of executive conduct are also subject to APA review. E. g., Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). The APA itself defines "agency action" to include -- in addition to a "rule" or "order" -- the "denial" of "relief" or "the equivalent . . . thereof," and the "failure to act."<sup>\*</sup> These latter terms aptly describe the President's failure to turn over the evidence which the Committee has demanded.<sup>\*\*</sup> Since the President should be regarded as an "agency" for APA purposes<sup>\*\*\*</sup> it follows that the APA affords jurisdiction over this action.

Third, the Committee has a legal right to have lawful subpoenas obeyed. see Watkins v. U.S., 354 U.S. 178, 187 (1957), has therefore suffered "legal wrong" by reason of the President's refusal to comply, and accordingly has standing to seek judicial review of the validity of the President's actions.

(Footnote continued from preceding page.)

In presenting the positions of the various Circuits, the Brief in Opposition has also cited a Second Circuit ruling, Ove Gustavson Contracting Co. v. Floete, 278 F.2d 912 (2d Cir. 1960), which is no longer the law in that Circuit. See Rettinger v. FTC, 392 F.2d 454 (2d Cir. 1968); Citizens Committee for Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir.), cert. denied, 400 U.S. 949 (1970).

<sup>\*</sup>"[A]gency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551 (13).

<sup>\*\*</sup>In fact, the term "adjudication," as defined by the APA, could well apply to the President's action. See 5 U.S.C. § 551 (6 and 7).

<sup>\*\*\*</sup>As already pointed out (Supp. Mem. 26), it is the better and emerging view that the President is an "agency" for APA purposes. As Judge Leventhal stated in Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 761 (D.D.C. 1971) (three-judge court):

"The leading students of the APA, whose analyses are often cited by the Supreme Court, and who on some matters are in conflict with each other, seem to be in agreement that the term 'agency' in the APA includes the President - a conclusion fortified by the care taken to make express exclusion of 'Congress' and 'the courts.'"

Judge Leventhal cited the following authorities in support of this conclusion: R. Berger, Administrative Arbitrariness - A Synthesis, 78 Yale L.J. 965, 997 (1969); K. Davis, Administrative Arbitrariness - A Postscript, 114 U. of Pa. L. Rev. 823, 832 (1966); L. Jaffee, The Right to Judicial Review, 71 Harv. L. Rev. 401, 769, 778, 781 (1958). Id. at 761, n. 43.

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IV The President Is Not Privileged to Disobey the Committee's Subpenas

In dealing with the merits of this controversy, the Brief in Opposition engages in a wide-ranging discussion of the generalized need for confidentiality in government. This discussion is largely beside the point, almost wholly ignoring the narrow thrust of the Committee's subpenas and the fact that they are directed at possible criminal misconduct by executive officials.

Counsel for defendant President at no point challenge the Committee's assertion that the President enjoys no privilege to withhold evidence relating to his own criminality. As we have shown (Mem., pp. 18,19), the defendant President has already conceded this point, and this concession was reiterated in the Court of Appeals proceeding on the Special Prosecutor's case.<sup>\*/</sup> The President has sought to avoid the impact of that concession in this case by contending that the Committee lacks authority to investigate presidential misconduct, but we have also shown (pp. 19 -21 supra) this contention to be without merit. Accordingly, the President is required to respond to the Committee's subpenas insofar as they bear on his own possible wrongdoing.<sup>\*\*</sup>

As we have shown (Mem. pp. 21-27), there is likewise no executive privilege to withhold evidence relating to criminal wrongdoing by presidential subordinates. There is no substance in the President's effort to avoid this showing by reference to a supposed "unbroken record of successful assertions" of executive privilege against Congress (Mem., p. 54). As Professor Berger has established with painstaking care, see R. Berger, Congressional Inquiry vs. Executive Privilege,

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<sup>\*/</sup> Brief of Petitioner in No. 73 - 1962, at 69-71.

<sup>\*\*</sup>/We trust the Court will recognize that the reference to the President's own possible criminality is not recklessly made. There is certainly much evidence that would exonerate the President, but, as demonstrated in our Statement of Material Facts, there is sufficient evidence to establish a prima facie case that the President was engaged in criminal conduct. In such circumstances, executive privilege cannot be used to suppress evidence that would tend to prove or disprove this prima facie case.

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12 U.C.L.A. L. Rev. 1043 (1965), this claim rests on a gross distortion of the historical record. In many significant instances the President has yielded to Congressional demands for information. See Berger, supra, at 1078 et seq. In other instances, the Congress has yielded. <sup>\*/</sup> The general historical record is at best mixed and ambiguous, and will not support the President's blanket claim of absolute discretion to withhold any and all information from Congress.

Moreover, if analysis is confined to the precise issue in controversy here -- the Congress' right to evidence bearing on possible executive criminality where a threshold showing of wrongdoing has already been made out -- the historical record decidedly favors the Congress. As demonstrated in our Historical Appendix, the executive has, in such cases, repeatedly obeyed congressional subpoenas <sup>\*\*/</sup> and demands for information. The Brief in Opposition fails to document any contrary examples, and also fails to adduce any instances where Congress allegedly "acknowledged" (Br. 55) an executive right to withhold information in such circumstances.

The argument that legislators and judges, along with Presidents, have a need for confidentiality (Br. 60-71) likewise ignores the narrow scope of the issue presented here. The Committee has never asserted that the President is not entitled to a large measure of privacy in communicating with his aides. It has not sought to mount a wholesale

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<sup>\*/</sup> The Brief in Opposition (p. 50) dismisses the frequent examples of executive capitulation to congressional demands for evidence as instances of "voluntary" compliance. But the instances where Congress has failed to press evidentiary demands in the face of executive refusals might likewise be described as "voluntary." Moreover, as Professor Berger shows, it is simply not true, as claimed by defendant President (Br. 52), that where matters have been "forced to a showdown," Congress "has always yielded."

<sup>\*\*/</sup> In regard to the claim advanced in the Brief in Opposition (pp. 2-3) that no cabinet head has ever testified before a congressional committee in response to a subpoena, see historical evidence marshalled in our Supplemental Memorandum (p. 10, n. \*\*\*), which demonstrates that cabinet heads, through testimony and otherwise, have responded to congressional subpoenas.

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invasion of executive confidentiality.<sup>\*/</sup> The Committee simply asserts an absence of any privilege to suppress evidence of possible executive criminality where a threshold showing of wrongdoing has been made out. The defendant President concedes (Br. 60) that executive privilege exists "for the benefit of the public, not of the executive." As we have shown (Mem., p. 9, 18et seq.), the courts have concluded that executive privilege to suppress evidence of executive wrongdoing would plainly invite abuse, is not in the public interest, and ought not to be recognized. In Misc. 47-73, this Court specifically held that executive privilege cannot be "invoked as a cloak for serious criminal wrongdoing." (Op., p. 19)

The privileges enjoyed by the judicial and legislative branches are likewise vulnerable when criminality is involved. In Clark v. United States, 289 U.S. 1 (1933), the Supreme Court held that the jurors' privilege of secrecy fails when wrongdoing is involved, while this Court's decision in Misc. 47-73 observed (Op., p. 21):

"A Court would expect that if the privacy of its deliberations . . . were ever used to foster criminal conduct or to develop evidence of criminal wrongdoing, any privilege might be barred and privacy breached."

Even the legislator's privilege, grounded constitutionally on the specific language of the Speech or Debate Clause, does not offer a blanket shield to charges of criminal misconduct. In Gravel v. United States, 408 U.S. 606 (1972), the Court held that Senator Gravel's assistant could be compelled to testify about publication of the Pentagon Papers, which the Senator himself had read on the Senate floor. The Court went on to state that even the Senator could be interrogated by a grand jury

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<sup>\*/</sup> It should also be stressed that defendant President has made no claim that the materials sought by the Committee involve military or foreign relations secrets.

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concerning the sources of information which he relied on in performing his legislative duties if criminal conduct were indicated. 408 U.S. at 622.<sup>\*/</sup>

In United States v. Brewster, 408 U.S. 501 (1972), a Senator's conviction for making a floor speech in return for a bribe was upheld on the ground that [t]aking a bribe is, obviously, no part of the legislative process or function." 408 U.S. at 526. In view of these authorities, it is hardly tolerable for the Executive, who enjoys no constitutional grant of immunity,<sup>\*\*/</sup> to assert a privilege which is denied to legislators and the judicial branch.

Finally, we must reiterate that the selective disclosure authorized by the defendant President has destroyed any claim of confidentiality in this case. As already explained (Mem., pp. 28-33) the defendant President may not toy with the Select Committee by picking and choosing among tapes, papers, and memory, and only allowing revelation of those portions he apparently feels most beneficial to disclose. As also explained (Mem., pp. 29-30) the controlling Supreme Court decisions in Lopez v. United States, 373 U.S. 427 (1963) and Osborn v. United States, 385 U.S. 323 (1966) preclude the assertion of privilege with respect to recordings of conversations where the asserted privilege has been waived with respect to testimony regarding such conversations. For defendant President to have withheld all evidence, although unjustified, would be more defensible than allowing him to tailor the facts by choosing the most convenient stopping place in the evidence while still claiming publicly

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<sup>\*/</sup> Contrary to the President's assertion (Br. 62), Gravel does not provide a blanket immunity for communications between legislators and aides. Such protection extends only to legitimate "legislative acts," (33 L Ed at 603- 408 U.S. at 626) and Gravel makes clear that criminal activities are not within the sphere of legitimate legislative activity." 408 U.S. at 624

<sup>\*\*/</sup> For a discussion of the Framers' refusal to grant privileges to the Executive, see this Court's decision in Misc. 47-73, Op., pp. 3-5.



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that he has not waived executive privilege.<sup>\*/</sup>

All evidentiary privileges express important social interests in confidentiality. Yet all are waived by partial disclosure. The President has failed to explain what it is that sets apart the privilege which he asserts and enables him to present a one-sided version of the evidence to a tribunal which is constitutionally entitled to the full facts regarding possible wrongdoing by the President and his associates.

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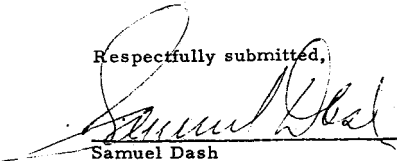
<sup>\*/</sup> The serious weakness of the President's position re the waiver issue is illustrated by his sole, misconceived reliance (Br. p. 51) on United States v. Reynolds, 345 U.S. 1 (1953), to establish the non-waivable nature of executive privilege despite the fact that Reynolds did not even discuss the concept of waiver and was fully distinguished in our initial memorandum (pp. 31-32).

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## CONCLUSION

For the reasons set forth above and in plaintiffs other memoranda, plaintiffs' Motion for Summary Judgment should be granted.

Respectfully submitted,



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September 11, 1973

Honorable Richard H. Ichord, Chairman  
Committee on Internal Security  
of the United States House of Representatives  
Washington, D. C.

Re: United States Servicemen's Fund et al v.  
James O. Eastland, et al.  
Nos. 24,279; 24,412 and 71-2034  
USCA for the District of Columbia Circuit

Dear Chairman Ichord:

As your staff was orally informed on August 30, 1973, the Court of Appeals, on that date, issued its opinion and judgment in the above cited case. This case is, of course, a companion case to similar cases filed against your Committee by the Progressive Labor Party, the National Peace Action Coalition and the Peoples Coalition for Peace and Justice and all of these cases were consolidated for appeal, though the judgment in the cases involving your Committee has not yet been issued.

As you are aware, in each of these cases, the Department of Justice in representing your Committee and the Senate Subcommittee strongly relied upon the doctrine of separation of powers and the Speech and Debate clause in arguing, inter alia, that the courts lacked subject matter jurisdiction of the litigation because there were no parties properly before the court as to whom effective relief could be fashioned, that, in any event, even if the courts were assumed to have subject matter jurisdiction, the cases should be held to be non-justiciable because of the respect due a coordinate branch of the Government and because of the need to avoid a Constitutional confrontation between two coordinate branches of the Government.

We have further contended that the defendants, including the Congressional defendants and the members of their staff, were immune from suit. In the case involving the Senate subcommittee, we also raised the privilege of the Congress over its records and papers as a defense to the attempted deposition of the Subcommittee counsel.

Copies of the opinion of the Court of Appeals have been furnished to your staff. In this decision, the Court of Appeals has held that the cases are within the jurisdiction of the Courts, that they do present justiciable issues, that the Congressional defendants, including both the Senators and House members themselves, are not immune from suit, and that the Senators and House members should not have been dismissed from the suits by the District Court.

Moreover, though not deciding the point, the Court of Appeals also directs the trial court to, on remand, reconsider the sustaining of the Senate's claim of privilege as to the records and documents of the Senate. This claim was made after the Senate passed a resolution ordering staff counsel to testify only concerning matters in the public record and prohibiting counsel from producing any information from the files of the Senate.

A petition for a writ of certiorari in the case involving the Senate Subcommittee would have to be filed in the Supreme Court by November 28, 1973. Since the panel in the Court of Appeals included a judge sitting by designation from another circuit and the two judges from the District of Columbia circuit split on the decision, a petition for rehearing en banc may be considered appropriate, particularly since the District of Columbia is the only jurisdiction in which this type of suit may be brought. The date for petition for rehearing would normally expire on September 13, 1973, but we are requesting an extension of time to file such a petition for a thirty day period to and including October 13, 1973. A similar request will be made to extend the period for rehearing in the cases involving your Committee.

The purpose of this letter is to solicit your views on the question of whether or not these cases should be further appealed, either by the filing of a petition for a writ of certiorari in the Supreme Court, or by the filing for a petition for rehearing with a suggestion of en banc rehearing with the circuit court. It is also to request that you consider this question in light of the legal issues involved in these cases and the possible conflict of the legal arguments advanced with the legal position that may be taken by the Senate Committee on Campaign Activities in its civil suit attempting to obtain the production of the Presidential tapes.

It is also requested that, if you desire to further pursue these matters on appeal, consideration be given to whether or not you wish to obtain the services of private counsel to represent you further, particularly in light of the litigation now being pursued by the Special Prosecutor

also concerning the Presidential tapes. While there is no statutory authority for the representation of Congressional committees by the Department of Justice such representation has, of course, been traditional. However, as you are also aware, there is substantial precedent for Congress' hiring private counsel, particularly in cases where the legal issues to be explored by the litigation raises the possibility of conflict with the positions taken by the Department of Justice or other parts of the executive branch in other litigation.

We would appreciate receiving your views on these matters and any instructions you may have concerning further action by the Department of Justice on the Committee's or House's behalf as soon as is possible..

Respectfully,

Henry E. Petersen  
Assistant Attorney General  
Criminal Division

cc: Honorable Sam J. Ervin, Jr., Chairman  
Senate Committee on Presidential Campaign Activities  
United States Senate.  
Washington, D. C.

Mr. Samuel Dash  
Chief Counsel  
Senate Committee on Presidential Campaign Activities  
Washington, D. C.

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Honorable James O. Eastland, Chairman  
Subcommittee on Internal Security of the  
Committee of the Judiciary of the United States Senate  
Washington, D. C.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL

CAMPAIGN ACTIVITIES, et al

vs. The Committee on

RICHARD M. NIXON

Civil Action No.

1593-73

Thursday, October 4, 1973

The above-entitled cause came on for hearing on  
motion of Plaintiffs for Summary Judgment, at 10:00 a.m.  
before THE HONORABLE CHIEF JUDGE JOHN J. SIRICA.

APPEARANCES:

On Behalf of the Plaintiffs:

SAMUEL DASH  
JAMES HAMILTON  
RONALD D. ROTUNDA  
DONALD BURRIS  
WILLIAM T. MAYTON

On Behalf of the Defendant:

CHARLES ALAN WRIGHT  
LEONARD GARMENT  
DOUGLAS M. PARKER  
THOMAS P. MARINIS  
ROBERT T. ANDREWS

P R O C E E D I N G S

**THE COURT:** Are you ready, Mr. Dash?

**MR. DASH:** Yes, Your Honor.

May it please the Court: my name is Samuel Dash,

Chief Counsel for the Senate Select Committee on Presidential Campaign Activities. The caption of our case is Senate Select Committee on Presidential Campaign Activities, et al vs Richard Nixon, Civil Action No. 1593-73.

We are here, Your Honor, on the Plaintiffs' motion for Summary Judgment on the complaint it filed for Declaratory Judgment.

Briefly, I think the facts are well known that on July 23, 1973 the Senate Select Committee after a unanimous vote of the Committee actually done in public session, voted to send two subpoenas to the President of the United States for five specific tapes, conversations or recordings on electronic tape, and some documents related to specified persons. All of the subpoenas -- the two subpoenas -- and the matters subpoenaed were clearly indicated as relating to criminal activities which were part of the investigation under the Senate Resolution 60 which has been on-going and is still as a matter of fact in session now.

The subpoenas were required, Your Honor, because the Committee through its own investigative process and its own public hearings came across information through the testimony of

Mr. Butterfield that an on-going recording had taken place during the period relevant to the 'Committee's inquiry of conversations that were extremely pertinent to the investigation of the Committee.

The Committee had heard the testimony of various persons, specially Mr. John Dean, who had testified to specific conversations with the President in the Oval office in which he alleged that he had informed the President as early as September 15, 1972 of various activities on his part that the President at least indicated knowledge of these activities which Mr. Dean stated to the Committee left him with the conviction that the President was fully aware of the cover-up activity that was going on.

There was other testimony before the Committee --Mr. Haldeman's testimony, Mr. Ehrlichman's testimony which would interpret the conversation of September 15 and also other conversations of February 28th and March 13, March 21st as somewhat differently than Mr. Dean testified to.

And when the Committee learned for the first time, as a matter of fact, it did not really have to try to weigh these discrepancies based on credibility of the witnesses, or number of the witnesses, that in fact exact recordings of these very conversations that were being testified to before the Committee and within the framework of the resolution of the Committee that there were such recordings, and perhaps might be



the ultimate witness for the Committee, the Committee sought to obtain these tapes first by cooperation with the President's office, it failed to accomplish this and finally was required to issue subpoenas.

I think it is also well known the President responded by refusing to honor the subpoenas claiming Executive privilege and separation of powers which in a sense equates with his Executive privilege.

The Committee believes that it is essential, Your Honor, that these tapes be attained or the information that appears on the tapes be attained by the Committee in order to carry out its mandate.

THE COURT: Does the Committee contend it is necessary to listen to these tapes for the purpose of writing an adequate report in this case?

MR. DASH: I would like to say for the purpose of writing a full report.

THE COURT: May I ask a question on that?

I want to preface my remarks, of course, that any time I ask a question doesn't indicate how I am going to rule in this case, I am simply seeking information from both sides.

On page 39 of your brief, the brief on behalf of the President filed by his counsel, counsel notes a statement made by Senator Daniel K. Inouye, one of the Plaintiffs in this case, on NBC's Meet the Press last month. His statement came in

response to a question posed by Mr. Carl Stern which was as follows, and I am quoting from the transcript:

"MR. STERN: The White House has won a delay in responding to your Committee's suite for the Presidential tapes making it almost certain that the Committee will not get access to those tapes before the end of the hearings even if it wins its fight in court. Does it make any difference, and would the Committee consider possibly postponing its report to the full Senate until such time as the tapes matter is resolved?

"SENATOR INOUE: As far as I am concerned personally, this is where the difference between a legislative and a judicial proceeding come in. If this were a criminal matter I would say the tapes are absolutely necessary and essential. But in our case I think we can proceed and file an adequate report without the tapes."

This subject was again raised later in the same interview.

"MR. STERN: Senator, I am puzzled by your previous response to me that it wouldn't make much difference whether you get those tapes or not. Not only is that inconsistent with the position your own lawyers are taking in the courts but also take for example Mr. Dean, a central figure in the matter who has raised some very serious charges. I don't know of any way of establishing whether he told the

truth or not except those tapes. Doesn't it matter to you in your final report whether you establish who is telling the truth?

"SENATOR INOUE: I said this was my personal view and this makes a difference between a legislative investigation and a criminal case. In a criminal case it would be absolutely essential. I would say the tapes be made available. But for the purpose of this committee I am certain the Committee report can be made.

"MR STERN: You personally don't care who is telling the truth?

"SENATOR INOUE: Because it is not our business to decide the guilt or innocence of any party; this is my view."

Now, is your position here inconsistent, Mr. Dash, with the position taken by Senator Inouye?

MR. DASH: Well, not completely. I think there are two things I would like to say to Senator Inouye's response to Mr. Stern's interview.

Number 1, I think he did emphasize he was expressing a personal view and not the Senate's. I think the Senate was unanimous in its vote and its effort to obtain the tapes and in its claim that it absolutely needs the tapes in order to not write an adequate report but to write a full report in accordance with its mandate.

Senator Inouye's statement was actually issued in that interview for the purpose of dispelling a viewpoint that was abroad that if we didn't get the tapes the Committee would pull apart and we couldn't do anything.

I think in perfect candor if we didn't get the tapes there is enough information that the Committee has received in which a report, an adequate report might be written in which we could make some legislative recommendation. But I must emphasize to the Court that this particular committee was created in a crisis, the issues involving the integrity of the electoral process are so great, the mandate and the resolution was unanimous in the Senate calling upon the committee to investigate fully all the facts in this case and come up not with an adequate report, but with the best possible report with the best possible legislative recommendations for reform so these things will never happen again.

And therefore I don't believe that what Senator Inouye was saying is inconsistent with the position we have before the Court. Obviously we are not out of business if we don't get the tapes, but obviously it is essential that we get the tapes to do the job that the unanimous Senate vote called upon the committee to do, and I think there is a distinction between an adequate report and a really full report that safeguards the electoral process for the country.

Now the counsel for the President seeks to present this case as unique, as I think he did when the Special Prosecutor and he were before the Court, and he says in his brief that no Court has ever ordered the President to turn over material where Executive privilege has been asserted. And he really ignores, strangely, that Your Honor, this Court, has entered such an order in the recent case brought by the Special Prosecutor for the same tapes as we subpoenaed.

Judicial review of Executive privilege question is really not new as demonstrated in the Reynolds case, and judicial review of confrontations between the Congress and Executive is not a rarity.

The Youngstown Sheet & Tube Company case which was the steel seizure case; the Meyers case, the Lovett case, all cases where conflicts where the issue of executive privilege have risen.

What in effect the President's counsel seeks to distinguish especially in cases where the President himself is not involved, is this was Executive Branch matters and not the President.

I think Your Honor well stated in your opinion in the case before you that was brought by the Special Prosecutor. You indicated that the President's position would set up really a fourth branch of government and distinguished the President from his out-reach which are the very people who operate for him,

As a matter of fact, the Youngstown Sheet and Tube

Company case really was a case where the Court dealt with what the President done in seizing the steel mills even though the particular person named was Sawyer, the Secretary of Commerce.

THE COURT: Talking about absolute privilege now, correct?

MR. DASH: Talking about the absolute privilege issue.

THE COURT: Let me ask you this. Obviously you can see I'm reading from these questions, I can't remember all these things and I write them out. I'm not trying to trap either side.

Now, in connection with this, doesn't the Congress claim the same sort of absolute privilege for its papers as the President claims here? Suppose the attorney general subpoenaed papers from a certain congressional committee or senator, or member of the House, and refused to honor the subpoena, they wouldn't honor the subpoena say, would you say the attorney general would come to the court for help in enforcing the subpoena, the court could properly issue a declaratory judgment or injunction against them?

MR. DASH: Yes, I do.

THE COURT: Distinguish the two. You see, as you know, I haven't ruled finally on anything in the decision I rendered. I simply have gone as far as saying I have taken the middle of the road approach and I can't possibly determine the question of privilege until I hear the tapes, if I ever hear them.

MR. DASH: That is correct, Your Honor, and I think Your Honor has ruled, however, on the key issues that also govern

this case, and the two key issues deal with whether or not the President has an absolute unreviewable determination of executive privilege; and two, whether or not this court's process extends to the President. I suggest that issue is no different than the Congress. Whatever Congress's executive privilege is is reviewable by the court under Powell vs McCormack decisions and all decisions of the court says executive privilege issue is a matter that is determined by the court and we would not assert an absolute power in the Congress to hold that would not be subject to court review. And I think that our position is no different than the Executive's position.

Now we submit that the court has only recently held that in this area as rules have indicated and we are on familiar territory in resolving the controversy involved in this case. The controversy, Your Honor, is fully mature and ripe for judicial resolution on our motion for summary judgment. The defendant has not controverted any of the items set forth in our statement of material facts as to which there is no genuine issue as we set forth in the motion for summary judgment. All issues of defense have been fully briefed and are before Your Honor, and I think we are ripe for a decision.

The major questions on the merits as I have just indicated, have already been decided by the court, although Your Honor has reserved the question whether or not in this particular case with regard to these tapes, and our case it would

have to be in regard to even the documents we have asked in our second subpoena. There is an Executive privilege, and I should state here there is no issue between the President and the Committee on the existence of Executive privilege. I would say we could probably agree with two-thirds of the President's brief. There he sets out in broad outline the Executive privilege which he needs in order to carry out his constitutional duties, or statutory duties.

Senator Ervin, Chairman of the Committee, has frequently stated that he concurs and agrees there must be an Executive privilege where the President must be in a position to be able to withhold certain materials in order to preserve confidentiality.

We are here not on the broad issue, we are not asking this Court to declare a broad order on Executive privilege. We are here to talk about a very narrow case and we ask that as the Special Prosecutor asked the Court to make a determination whether or not Executive privilege issue is properly raised here and it is for the Court as Your Honor ruled, to determine that issue, and here what we are asking for is not all the papers of the President. We are not asking for a rampage through the President's papers, the spectre that the President's counsel raises as he did in the prior case --four hundred separate district courts coming in and all suites being drawn to get the President's papers is unreal.



THE COURT: Let me ask you this question: the function of your committee is entirely different than the function of the grand jury, we know that. You have a legislative function.

MR. DASH: Yes. I suggest, Your Honor, it is not only different but I say equal if not more important in this case because I would suggest to Your Honor - -

THE COURT: --now, do you know of any other case in almost two hundred years of history of our government where the same approach has been made, where a person, say, has been subpoenaed to appear before the committee to produce certain records and refusal has been made? The usual way to obtain relief on the part of the Committee is either by getting the sergeant-of-arms to arrest the person --of course you never entertained that idea. Then you have Title 2, Section 192 of the United States Code whereby you turn the matter over to the United States Attorney, Department of Justice, to bring suits by way of prosecution. You didn't select that. Now is this the first time this avenue has been tried, this approach has been tried by way of declaratory judgment?

MR. DASH: Yes.

THE COURT: All you are asking for is a ruling on the legality.

MR. DASH: On the legality. And I think the uniqueness and why we are in this position is not the responsibility of the Committee but the President put us in this position.

We would have preferred --as a matter of fact, we sought to obtain the tapes from the people who had them at the time we learned of their existence.

As a matter of fact, the tapes and these documents were actually not in the exclusive possession of the President. Mr. Butterfield testified under oath before the Committee that the Secret Service had them and they were maintained and possessed by them. But it is only when we sought to obtain them that the President took exclusive control over them in a sense, using an early analogy, put himself in the schoolhouse door. And he presented the confrontation. Ordinarily we would have subpoenaed an official subordinate to the President and then the proper route would have been either a recommendation for citation for contempt which we come the criminal route referring to the prosecutor or the extraordinary way of our common law powers to prosecute ourselves through the sergeant-of-arms.

THE COURT: What you are saying in effect is this: if the President had not personally taken possession of these tapes, if they were not within his actual or constructive possession at the present time, the Committee would have probably proceeded by way of asking for an indictment under Title 2, Section 192, if some subordinate had possession of the tapes?

MR. DASH: Yes. As I say, we are put in this position because of the President's action. I think the Court can clearly

understand that where the President himself now has placed himself as the person who must be confronted on this issue, that it would be unseemly of course to use our common law powers through the sergeant-of-arms with the President of the United States, but we also believe it would be unseemly to refer the President for criminal indictment. As a matter of fact we may not be able to because taking the President's counsel's own position that the President cannot be indicted under that particular statute which provides for a misdemeanor unless he is impeached. So you have to go the impeachment route before you can even refer to the prosecutor for indictment. Therefore, really there was no viable procedure for the Committee. A very ugly confrontation would have been presented if we had gone the criminal route, or the sergeant-of-arms route; and very frankly, where the President <sup>now</sup> himself/has asserted exclusive control, the declaratory judgment route really what we are talking about is legality of his claim of executive privilege and it seems to me that claim doesn't call for extreme legal positions and we ought to take what is a sensible position that a civil suite such as this allows this Court to rule upon it as it did in the Special Prosecutor's case.

By the way, under *Powell vs McCormack* it is not important whether or not if you can rule on legality or action whether your command can be enforced against the President. As *Powell* stated it is perfectly justiciable to do that even if the ultimate question is whether the Court can enforce it.

So we submit, Your Honor, that even though this is an unusual case it is the first time it has ever happened and I think we have to meet first events with first procedures. That does not change the posture of this case. And whether or not this case comes before Your Honor on a civil law suit or comes before Your Honor on the legality of a criminal prosecution, the issue is the same and we suggest that it is ready for resolution.

The major question on the merits, as I indicated, have been tried by this Court despite defendant's counsel ignoring of the ruling in his brief. It may be that counsel has this Court's opinion on appeal, but this Court's opinion still is a ruling, a very important ruling historically, and we suggest that when we are before this Court and arguing before you, that order is a precedent and we rely on it.

THE COURT: Excuse the interruption.

You mention the ruling is on appeal, it is true. I think the Committee filed an amicus curae brief in the Court of Appeals, correct?

MR. DASH: Yes.

THE COURT: It did not argue the question involved. Was there any answer filed by the President's counsel to the amicus brief?

MR. DASH: The President's counsel opposed our filing the amicus brief; the Special Prosecutor did not oppose our filing the amicus brief but opposed our oral argument. The Court

nevertheless accepted it over the President's objection. It was a short brief and what we really did in that case is send up to the Court of Appeals our brief before you on our motion for summary judgment.

THE COURT: I was going to ask you that. So the Court of Appeals has before it now by reason of the fact you were permitted to file your amicus brief, setting forth substantially the same question you are raising today?

MR. DASH: Yes, but we are not before the Court of Appeals and the order and judgment of the Court of Appeals will not affect us, and we were there -- first of all the reason we filed the amicus brief, Your Honor, was we felt when the Court of Appeals, since there was so much rush to get the case resolved, since the Court of Appeals had it before it, when it would make its decision it should understand that its judgment was not just passing upon the Special Prosecutor's issues but the full spectrum of issues should be known.

THE COURT: That is what I had in mind, the Court of Appeals could in effect, if it desired to do so, recognize the points you have raised?

MR. DASH: It would be unlikely, Your Honor.

THE COURT: You don't know, there is no way of telling.

MR. DASH: As amicus our only right was to argue in a sense, or present the arguments to support Mr. Cox's position. We could not argue our position in an amicus case. And the issues

we raise, Your Honor, were really not before the Court fully.

THE COURT: It could, for example, if it wanted to do so, having in mind its power and rights, indicate by way of dicta what it thinks about certain points you raise.

MR. DASH: It may, and it may be helpful to Your Honor. Might be helpful to Your Honor as to how Your Honor rules. I don't like to predict what the Court of Appeals would do.

The claim of Executive privilege that is made here, and I think Your Honor has recognized this in the opinion, cannot shield possible criminal conduct anymore than the other privileges do. And I think all privileges which are recognized by law yield where the facts sought to be withheld are necessary to resolve questions of criminality.

I think the President through his counsel raises as one of the important, or two major issues that they raise and then some subsidiary issues, and that is judiciability which is another word for triability of the case before the Court under Article 3, Section 2, and jurisdiction.

Very frankly, we submit that the Select Committee's complaint presents a fully judicable action for the Court, putting aside the defendant's challenge to our investigation under our resolution and authority to issue the subpoena to the President.

The Select Committee has subpoenaed certain tapes and documents relating to criminal activity in the possession of the

President. The President refused to honor these subpoenas on the ground of Executive privilege. We seek through this complaint for declaratory judgment through the Court of the right of the Committee to obtain the materials subpoenaed.

The Supreme Court has held in United States vs Reynolds which this Court has cited in its opinion, and the Committee for Nuclear Responsibility vs Seaborg, and this Court has held, that the Court does have responsibility to resolving these issues of Executive privilege.

In Reynolds you remember the issue was whether or not the persons who were seeking some special information, reports, and dealt with some secrets involving a new airplane which crashed, the government did proffer certain witnesses but the proffer was not accepted.

In our case we had witnesses come forward. Of course that is the uniqueness of our case because the very existence of those witnesses creates a problem and need for the tapes. Although Reynolds clearly supports this Court's position that it is a court's decision not the Executive's absolute power of decision. Reynolds in that case found there was no right of the plaintiffs to get the reports.

Here we are not asking for military secrets or national security reports. As a matter of fact, we are asking for the other side of the coin of the conversations we heard. We have heard the testimony. All we want is that same conversation which

was recorded. And it seems to us, and I will get to this very shortly under our waiver claim, that if we have heard the testimony I see no reason why we shouldn't be able to actually hear that same conversation that has been recorded.

Now, a proceeding under the Declaratory Judgment Act, and I think I have gone into this in answering your questions are especially appropriate in this case for reasons I have given you, we do not want to seek because the President is placing himself in a position of confrontation, the criminal route -- the reason the criminal route, Your Honor, is not a good one in this case. In fact, it would actually be a very poor procedure for us if we had it, it was probable to get the President indicted under the statute before he is impeached, the criminal route is a lengthy one. One would have to refer that to the prosecutor, would have to go to a grand jury, would have to be an indictment in a criminal case and our committee has a short life. We must file under our resolution our report by February 28, 1974, and I don't believe a criminal case could be really resolved and disposed of, taking appeals and everything else by that time.

Where basically the issue is Executive privilege a civil law suite is more expeditious and permits a more workable solution to the controversy and this is exactly, by the way, the procedure followed in *Powell vs McCormack*, where a very knotty issue was presented before the court, where the question



of the right of Congress, or the House of Representatives to determine the qualifications of its own members. And here the Court didn't flinch from resolving that issue. It said it could interpret Constitutional provisions and it did file a declaratory judgment and in Powell the Court said this was a very useful procedure and it was useful especially because it may be dealing with an area where the order of the Court couldn't be ultimately enforced but actual legality of the position could be determined.

On the question of whether the order of the Court could be enforced or not I would like to follow Your Honor's position in the opinion that we ought to expect that the President will in the last analysis when final court decisions are made, obey the final Court decisions, and he in fact has indicated that he will.

The matter is justiciable despite the fact the President is the named defendant as was made clear by Chief Justice Marshall in United States vs Burr, and more recent in the steel seizure case where in fact it was the President's ruling in seizing the steel mills that were in effect. And this Court has held in the Special Prosecutor's case that it has the power to act in a case essentially the same as ours which is brought against the President.

The Select Committee would have had it differently as I indicated. We would have preferred to have proceeded against a subordinate. This was taken away from us actually by

the decision of the President in his very sudden seizure of the exclusive control of the tapes and documents and forcing us really to proceed against him.

Defendant's counsel has presented, Your Honor, what we consider a labored, if not tortured argument that our case is not justiciable for trial before the Court. In essence he claims that our complaint presents a political question which cannot be decided by this Court. Actually if you take the justiciability argument that the President makes in his brief it is in effect an argument contrary to this Court's rule because it is based on what he considers to be an absolute unreviewable Executive right to determine Executive privilege. Therefore, if it is so it is a political question committed demonstrably by the Constitution to the President and therefore this Court can't review it. We submit, Your Honor, there is really nothing in the Constitution that supports them. There is no demonstrable commitment to this issue to the Executive Branch. He reaches out for definition of a political question set forth in *Baker vs Carr* and later restated in *Powell vs McCormack*, and he seeks to identify this so-called textually demonstrable commitment to the Executive, and what he comes up with is the fact that the Constitution does vest in the President executive power. We agree with that.

The Constitution does provide that the President may require written opinions from his subordinates, and we would agree with that. The President does have the power and the duty

to give an annual State of the Union report to the Congress. They suggest that is the only time the President can give information, that since it is an annual state of the union message it is by Constitutional requirement of his message rather than by subpoena and the information is obtained from the President. We suggest that is a distortion of that provision and certainly not a textually demonstrable commitment. And also the President is required to enforce, to take steps to enforce the law. We not only agree with that but feel it is inconsistent with his duties to take steps to enforce the laws by standing in the way of enforcing of the laws by Special Prosecutor or our seeking of the tapes for the purpose of making legislative recommendations for criminal statutes.

And just briefly in response to Your Honor's question which I began to more fully to respond to, on the difference between the Special Prosecutor's responsibility and our responsibility it certainly is a difference. The Special Prosecutor is a prosecutor and he is proceeding before the grandjury and ultimately if the grand jury finds probable cause/<sup>there</sup>will be an indictment in a criminal case and it is his duty to determine whether or not there is proof beyond a reasonable doubt for a conviction.

Our responsibilities, Your Honor, is coordinate. It is certainly not inferior to the duty of the prosecutor to proceed by criminal prosecution. The position of the Senate Select Committee under its mandate is to first fully investigate the

facts, and the President doesn't disagree with our power in that. And to come up with legislative recommendations for reform.

Your Honor, this particular case in the crisis that has confronted the country due to what in essence was a breakdown, corruption of the electoral process, we submit that the duty of the Select Committee in carrying out its responsibilities may even be greater actually if you are looking at a priority for this point --I was going to say in this point in time. I better watch my vocabulary. But as a matter of priority it is perhaps more important that our committee will forward its work because although it is important that people who have engaged in wrongdoing be brought to the bar of justice and be convicted, but it is much more important if a state of fact existed which had corrupted the electoral process which can actually endanger our free society, then it is the Congress that after identifying these facts come forward for legislative recommendations which might prevent this from ever happening again. And I think we look to that as a very essential and important duty of the Congress.

That also leads again to my response to Senator Inouye's statement that the only way we can do this effectively is by getting all the facts and making a full report, and also having public support for what we do.

This Court has stated in its opinion as it reviewed the Constitutional history that the fact that the President is a named party it does not prevent this from being a justiciable case. You in your opinion reviewed the Constitutional history

and found as a matter of fact that there is no special privilege for the executive that was ever provided even though there is a limited one for the legislative. Whatever executive privilege a president has does not come from a textually demonstrable commitment.

I think your own interpretation of the constitutional history shows there is none, there is no textually demonstrable commitment. It is implied, it is there, whatever executive privilege the courts recognize we recognize. It is there to help him carry out his constitutional duties and that is why it is for this court to determine whether or not he has in individual cases.

Defendant's counsel overlooked the distinction the Supreme Court made in Baker vs Carr between a political question which the Court said the Court shouldn't get into, in political cases.

There are many cases where courts get involved in where it may be called political cases because it involves the Congress, or the Executive Branch. The fact there is a political issue does not make it a political question and in Baker vs Carr the Court said the Court cannot reject as a no law suite a bonafide controversy as to whether some action denominated "political" exceeds constitutional authority. And the Court emphasized the necessity for a discriminating inquiry into precise facts of each case. And I suggest, Your Honor, that is exactly what the

counsel for the President has not done here. There has been no discriminating inquiry on precise facts. The brief we have here is a very broad brief of justiciability issues on executive privilege generally but nothing that addresses itself to what we are talking about here in the Select Committee's request for the tapes.

We are not, as I have indicated, asking for any ruling by this Court that the President doesn't have Executive privilege. He certainly does. We are saying that in a particular situation where we have identified the tapes by the tape, by the minutes of the conversation where we have already by testimony indicated what was talked about during that period of time, and that we have made a prima facie case by the way of Mr. Dean's testimony of possible criminality on the part of the President that Executive privilege clearly cannot be stated here.

It is that narrow ruling that we ask for, and no broader one. And we ask Your Honor to recognize that as the only thing we are asking the Court to do in this case.

Counsel for defendant ignored these facts and only discussed the very broad issues which we agree with. We would sort of say amen to practically everything he says in the brief on these issues.

This is a very narrow case as I indicated. It is not like, by the way, the Mississippi vs Johnson, where the President there was exercising a discretionary power of his office whether

or not, or how he was going to carry out the Reconstruction Act. It is clear where the President is acting on a discretionary area within his office no court should intervene and tell him how to exercise Executive discretion.

But as Your Honor stated in your opinion that response to a subpoena where there is no Executive privilege is in a sense a ministerial act and not discretionary act and we are not dealing with anything like Mississippi vs Johnson.

Finally, counsel for the President's argument on justiciability depends completely on the plain as I've indicated that Executive privilege is an unreviewable, absolute power of the President and so far as this Court is concerned this Court has rejected that argument.

Now on the question of jurisdiction, which is the second main branch of the President's challenge to our case, we submit that we have jurisdiction to bring this suite clearly under 28 U.S.C. 1331, granting this Court original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum of \$10,000 exclusive of interest and costs, and arises under the Constitution laws or treaties of the United States.

Now the only attack that the President's counsel makes on our claim for jurisdiction here is the amount in controversy issue and do we have an amount in controversy exceeding \$10,000. Your Honor, we submit we very clearly do.

THE COURT: Excuse me. Isn't it true that your position regarding the jurisdictional amount under 1331 which you just mentioned, is a claim not measurable in dollars and cents can nevertheless meet the \$10,000 minimum is a minority view as far as decided cases are concerned?

MR. DASH: Well, on the one it is not measurable, I would say yes and it deals with the question of important Constitutional rights as will be treated as meeting the amount in controversy. But we are not relying just on that, Your Honor, we think it is measurable.

We think and as a matter of fact have set forth in our affidavit of Senator Ervin, and by the way, there are cases that support that whole area. The President says that the issue is what is the value of our getting the tapes? Well, the value of the tapes on the other side of the coin is what direct cost to the Committee come from our not getting the tapes. Here we are reaching the point. We are seeking to find all the facts in the case and we are confronted with the discrepancies that we do find between Mr. Dean's testimony and the others. And without the tapes, to follow our mandate to get to all the issues that we do under the resolution, this will take --if we had the tapes now, by the way, and I think Senator Ervin said this frequently, we actually can terminate our hearings much sooner and write our report much sooner. And it is not the



length of our hearings I am referring to. Even when our hearings are terminated, and we have reported, Your Honor, publicly, that we intend to terminate these hearings fairly soon sometime in November. But if we haven't got these matters resolved, the staff instead of being screened down to a small staff that can now write a report, will have to keep all of its investigators, or at least a substantial number of them, its lawyers, in order to continue the investigative process to resolve discrepancies we may still have executive sessions where one senator will sit, and the cost of this, and we have actually audited it out, or counted it out in the affidavit what it costs us a day to operate and what it costs if we go on to extended public hearings and if you put that into effect, the unavailability of the tapes to us to carry out our mandate in effect can be measured in an amount of money more than \$10,000.

THE COURT: Do you have any precedent to that? Do you know of any other federal case precisely on that point, whether you can use Section 1331 on the facts?

MR. DASH: There are a number of cases I think in our supplemental brief, I think on page 17, Your Honor.

Bitterman vs Louisville-Nashville Railroad, and Federal Mutual Impliment and Hardware Insurance Company which was an Eighth Circuit case and Bitterman was a Supreme Court case. These cases dealt with, for instance, the Federated Mutual Implimer

and Hardware Insurance case involved and insurance company seeking from to enjoin one of its former agents/acting in a particular territory. The failure of its getting that particular relief would mean the cost it would have to engage in to police that agent. In the railroad case there is a suite to enjoin the railroad from spewing ashes all over the community. Even though an action by the court coming earlier would mean that it wouldn't cost \$10,000 because the ashes would not create that kind of damage. The fact an on-going situation, if the ashes were continuing, would cause the community the expense and therefore a direct flowing cost from the failure to get relief is really measurable in money. And I think we have not sought to speculate even, by affidavit of the Chairman we have given you figures what it cost us and we have indicated, although we don't have to indicate to you how many specific days it might, would clearly say on the basis of running this investigation it would be way over \$10,000.

We really think this is not a new issue before the Court, but it is a really proper method of determining the amount of controversy.

In addition, Your Honor, we point out and counsel says they will not dignify the argument that the worth of the tapes to the defendant is a matter that can be considered. We cite some cases to that area and Professor Wright in his own treatise actually states what the cost to the defendant might be in the outcome of the suite is a method of measuring it. And I think

here to the President we have raised the question of what the tax value may be actually involved in the Presidential documents. If in fact these tapes do reflect what Mr. Dean has testified to, and it is very unfortunate they do, and we sincerely state to the Court we hope the resolution of this case will not show Presidential involvement. If they did, what the value to the President in this case in terms of his present position and in response to an accusation it certainly would exceed \$10,000, and we cite cases in our brief which indicate that is a legitimate method of determining amount in controversy.

We cite, by the way, a number of others. Out of an excess of caution, Your Honor, we have cited our jurisdictional powers mandamus, under our right to sue in the name of the United States which we believe we have the Administrative Procedures Act, we cite those not just make way, we believe they are valid basis for jurisdiction and I think we fully briefed those, and the President has briefed them and they are before Your Honor and I wouldn't want to take Your Honor's time unless you have specific questions. But what we really rest on primarily is 1331 and we believe we make it and I don't know of a case where an issue of this kind has come before a court, although we are unique in nature.

THE COURT: I'm glad you mention that. You are really relying primarily on Section 1331 on the question of jurisdiction?

MR. DASH: Yes.

THE COURT: You made some argument in your brief regarding Article 3 of the Constitution.

MR. DASH: Yes. Under the resolution of the Senate which authorizes us to sue in the name of the United States we feel we do have jurisdiction under 1345 and under Article 3 where there is no statutory basis, and the United States is bringing an action under the Constitution and laws of the United States. And also this Court's very ruling or in its statement we are dealing with an administrative act not a discretionary one we believe brings us under the mandamus area although we are not at this point asking this Court to pass upon whether or not a writ of mandamus should issue, it is a declaratory judgment we want. We also believe there is sufficient dicta in the cases to indicate that the President is an agency and can come under the Administrative Procedures Act.

As I have indicated, we believe that we have very strong jurisdictional basis in 1331.

Now, what I would like to get to now is the Committee's authority because as another branch of the argument the President makes against our position, through his counsel has indicated the Committee has exceeded its authority under the Constitution, under legislative powers of the Constitution, and under its resolution.

Under the Constitution, Your Honor, may I submit that there is no disagreement between the President's counsel and us

as to the Constitutional powers of Congress to conduct legislative inquiries for the purpose of legislation.

I think its position is that we have got enough evidence already. In other words, if you established the pattern of criminality what more do you need in order to write a report and come up with recommendations. I think he ignores the fact of what kind of committee we are. We are, by the way, called the Watergate Committee so often they forget we are the Select Committee on Presidential Campaign Activities. And that is the thrust of our committee and the fact is that the Presidential campaign is involved, the President involved, and candidates for the presidency are involved, and the resolution is a broad one.

The resolution calls for an investigation of what candidates for the presidency did in 1972 and Mr. Nixon was a candidate for president although incumbent president, and what others did, criminally, improperly, or unethically. And, Your Honor, what in a sense the President is arguing is that we should do a factual inquiry but not too much. In other words, go so far and stop. Don't try and find out who really did it, it is not your business. When you really try to find out who really did it you are exposing for exposure sake. And I submit, Your Honor, in the Teapot Dome case the Select Committee in a very unique situation similar to ours, the scandal that was taking place in the country, the inquiry was what was the guilt of the

attorney general. And the President accepts this on the ground that Congress has jurisdiction to legislate on the office of the attorney general. What he ignores is that we are not claiming that our legislative purpose is based on what we will be able to legislate with regard to the President himself and presidential duties. He again forgets that this is a Select Committee on Presidential Campaign Activities and the Congress does have the power to legislate on presidential elections, on presidential campaign practices, and that has to deal with candidates for the presidency, and it may be an incumbent president who may be a candidate.

And the legislation that will come forward from our investigation may well deal with restrictions and limitations on candidates for the presidency during an election. And I think it is fairly clear and as I said before, we would hope this would not be the outcome of the investigation, but if it were to be established that the criminality of the President existed, this would call for drastic legislation that as I think the term of the Special Prosecutor has the right of going that far. It would call for drastic legislation. And we would have to establish that just as in other committees -- the McClellan Committee on improper labor activities -- what union leaders did, how far did it go? It was very important for the determination of what was the extent of legislation if these were just underlings. You can

take care of that perhaps with existing laws on the books already or some minor amendment. But if you really can show that the process has been interrupted so much then perhaps we need a re-working of our electoral process.

And if we had to do that, I would like to make a second point the President's counsel ignores. That you cannot get a drastic change in the laws on election for president unless you have full public support. And it is our responsibility to take this investigation as far as we can take it and to prove who in fact was involved, if in fact the President was involved, then certainly the public support for drastic legislation would be insured. And it seems to me that is a responsibility and that is why this is not a question of our exceeding our authority. Our authority is to legislate, it is to legislate in presidential campaign activities and we are acting within that constitutional authority.

Now the President indicates that our resolution may not permit us to carry out this responsibility, and primarily he is referring to the issue of whether or not our resolution authorizes us to subpoena the President.

Again, I must repeat, he ignores the name of our committee and our committee mandate and resolution. This again is the Select Committee on Presidential Campaign Activities. The President is in the center of this committee's focus, not the President as the President, but the President as a candidate

for the presidency. And as Senator Ervin, and we quote in the motion for summary judgment the language of Senator Ervin in legislative history just before the resolution was adopted, he stated to the Senate: that this resolution would call for the investigating whether any candidate for the presidency did anything wrong.

Senator Scott, to quote his language, says: this is probably the broadest resolution ever adopted by any house of congress and would permit the committee and its staff to go into the Executive Branch to ferret out the facts. And he is not making that statement by way of criticism but by way of defining the resolution and asking for certain amendments to get equal representation among Democrats and Republicans.

Therefore, Your Honor, under the resolution we deal with the President in the resolution. As a matter of fact I can read this very quickly because I think it may be important.

Section 1(a) of the resolution says:

"There is hereby established a select committee of the Senate which may be called for convenience of expression, the Select Committee on Presidential Campaign Activities, to conduct an investigation and study of the extent, if any, to which illegal, improper, unethical activities were engaged in by any person acting individually or in combination with



others in the presidential election of 1972, or any related campaign, or candidates conducted by or on behalf of any person seeking nomination."

And I would like to emphasize "by any person seeking nomination". And President Nixon was a person seeking nomination. Your Honor, it goes on in a very broad way and we submit the subpoena power of the committee in the resolution clearly indicates that the offices of the Executive Branch, including, and would reach the President.

We submit that the question of whether or not the resolution, Section 3(a)(6) which says the committees have power to go back to the Senate to seek remedies to enforce a situation where a person doesn't honor a subpoena goes back to what you and I were talking about earlier which would be the traditional method of going back to the Senate for a contempt procedure. But clearly under the 1928 resolution we have cited which came after the Reed case, the Senate authorized all its committees to go into court to enforce its rights and it is a discretionary power in the committee to go back to the Senate. Under the resolution we have the right to do this on our own.

The merits, as I have indicated earlier, in large have been resolved by Your Honor. We suggest even though this now is a matter between the legislative of the Congress and the Executive there is no distinction between that kind of issue on executive

privilege as Your Honor ruled, and between the grand jury and Executive. Here again we turn to the Court as arbitor of executive privilege as Reynolds and Powell vs McCormack has indicated the Court should engage in.

I just want to end by one very short reference to the question of waiver which the President's counsel almost ignores except perhaps for a footnote.

In this particular case he makes quite a point of the need for the President and confidentiality. Executive privilege is to preserve the confidentiality the President must have with people he must confer with. Again we agree that generally that is why executive privilege exists. But actually it is a farce. We talk about confidentiality in this particular case. What confidentiality remains after the President by letter to Mr. Dean and to the Committee waived executive privilege and attorney-client privilege when Mr. Dean was called before the Committee to testify to the very conversation. He authorized Mr. Dean to tell this committee everything that Mr. Dean talked to him about on the day we asked for these tapes and then Mr. Haldeman was given some of the tapes and was authorized by the President to come before the Committee and testify to at least some of the tapes. And the President himself in public statements has given his version of the tapes, and he also has given his version of the tapes to his counsel in written form.

So we have had so many versions of these conversations what confidentiality remains? What is to be protected? What secrets remain there? Although we have heard in one of the tapes in the argument the President's counsel made in Mr. Cox's case, is a very, very important military secret.

Your Honor, I think if that exists that can be excised. We don't seek military secrets. We seek the conversations recorded of the testimony we have already heard.

And we submit, Your Honor, that on the issue of confidentiality the President has really no standing here before this Court.

Thank you.

THE COURT: Mr. Wright, so I won't have to interrupt you during the middle of your argument, we will take a fifteen minute recess and you can go right through with your argument.

MR. WRIGHT: That will be perfectly agreeable, Your Honor.

(Recessed at 11:00 a.m.)

AFTER MID-MORNING RECESS -- 11:25 a.m.

THE COURT: Mr. Wright.

MR. WRIGHT: May it please the Court: having had the privilege of association for many years with Mr. Dash and work with the American Law Institute, I was not surprised at all by the very fair, balanced and lucid statement of this case that he made. Nevertheless, it seems to me the argument is but another manifestation of the infectious spirit of Watergate in which I have spoken to this Court before, that the end justifies the means, "damn constitutional distinctions, full speed ahead."

The most eminent --I think that is a fair characterization of legal historians we've had in this country, was Charles Warren.

In 1930 in Volume 10 of the Boston University Law Review he wrote an article entitled "Presidential Declarations of Independence." It is a lengthy and comprehensive review of the number of times the presidents through our history from Washington on have had to take firm and very frequently unpopular steps in order to preserve the independence of the presidential office against attempts by the congress to encroach.

Mr. Warren concluded that article with this paragraph that I think is quite relevant to the case:

"Whenever any branch of the government exceeds the limits of the grants made to by the Constitution, it to that extent ceases to represent the people

and assumes arbitrary power. Defense by the Executive of his constitutional powers becomes in very truth therefore, defense of popular rights, defense of power which the people granted to him."

It was in that sense President Cleveland spoke of his duties to the people not to relinquish any of the powers of his great office. It was in that sense President Buchanan stated the people have rights and prerogatives in the execution of his office by the President which every President is under duty to see, shall never be violated in his person but passed to his successors unimpaired by adoption of the dangerous precedents, in maintaining his rights against the trespassing congress the President defends not himself but the popular government, he represents not himself but the people.

It is in that spirit that President Nixon in this case takes what is demonstrably an unpopular position of insisting on the confidentiality of his office.

Before we get to the merits of this case and the obvious distinctions in my mind between this case and the case which I had the privilege of appearing before Your Honor a month or more ago, a distinction incidentally I believe the Court itself drew very clearly in footnote 11 of its opinion in which it said the views there stated are not necessarily representative of being accurate with regard to presidential refusals to respond to congressional demands for information.

Before going to the merits, as tempting as they are, it seems to me we have to consider the extraordinarily formidable jurisdictional obstacles that lie in the way of this unprecedented suite.

Prior to the commencement of this action it was widely reported in the press that Mr. Dash and Senator Ervin had met with two distinguished academicians, Professor Bickle and Professor Kurland, and they had been advised by Professor Bickle at least, the only way the Senate could bring a suite was to get a special act of Congress authorized. They apparently concluded the contrary and we shall demonstrate that they would have been better advised to follow Professor Bickle's advice.

First with regard to the nonjusticiability of the case because it is a political question. There is a great temptation to suppose the political question doctrine is if not dead at least shrunken to very tiny dimensions since *Powell v McCormack*. I must confess I had taken that view myself.

The Supreme Court taught us forcefully only last June we were wrong in the case of *Gilliam v Morgan*, 93 Supreme Court 2440, in which the Court in facts that are far removed from our present facts, the Court went out of its way in holding a particular matter nonjusticiable to criticize the Sixth Circuit because the Sixth Circuit used the phrase diminished vitality of the political question doctrine. The Supreme Court said that phrase was inappropriate, inaccurate, the doctrine is still of full vitality.

To me this case is quintessentially a political question. We have here for the first time that I know of in our history a suite in which one branch of government, or a representative group of one branch of the government is suing another branch of the government. And if that does not represent a nonjusticiable political question I do not know what does.

The cases that my friend Mr. Dash cites, he cites them both at pages 6 and 7 of his memo and the same cases again at pages 6 and 7 of his reply memo, are all distinguishable, they were all cases in which individuals or corporations were claiming that their rights had been violated -- Youngstown Sheet & Tube said there was no right to seize the steel mills. Humphrey's Executor said there was no right to fire me decedant from his position; Lovett the same thing; Congressman Powell claimed the House had no right to exclude him; Pocket Veto cases, the Indian Tribes were claiming that we have a right to take advantage of benefits Congress tried to give us in this case and which the President exercised the pocket veto.

So they were all cases in which the court was adjudicating as courts traditionally do on a claim of individual rights. During the course of nonjudication courts frequently are called upon to decide constitutional questions but they are not precedent I submit, for a case like this in which one branch is confronting directly another branch and comes to the third branch and say, you please be the referee. We think that this is what the

political question doctrine prohibits. We challenge the statutory jurisdiction of the court as well.

Mr. Dash has indicated that his principal reliance for statutory jurisdiction is on Section 1331, so I will reserve that for the moment and deal with other claims of jurisdiction because I think they can be disposed of rather quickly.

There is first an assertion in the supplemental memo at pages 22 and 23 and again in the reply memo at pages 16 and 17 that no statutory grant of jurisdiction is necessary but suite can be brought directly under Article 3 itself. If that is so a long line of Supreme Court cases going back at least as far as *Cory vs Curtis* in 1845 and as recently as *Powell vs McCormack* in 1969 are wrong. The Supreme Court has always said Congress controls jurisdiction, you cannot sue under Article 3 alone. The two cases relied on by my friend *In re Debs* and *New York Times vs United States* were not to the contrary, they were each cases brought by the United States and ever since Section 9 of the Judiciary Act of September 24, 1789 there has been statutory authority for jurisdiction for all suites commenced by the United States. So that argument I think requires no consideration.

With regard to Section 1445 they expressly disclaim that they come under the clause granting jurisdiction to a suite brought by an agency or officer authorized by act of Congress to sue. They say no, that we are suing in the name of and on behalf



of the United States. Well, that they can't do because an act of Congress, Section 516 says who may authorize suites in the name of and on behalf of the United States and it is the Attorney General of the United States and the Attorney General alone. There is no claim here the Attorney General has authorized this suite or has brought this suite.

The suggestion that any group, whether it be private citizen, senators, the Select Committee, can come into a court and say we are the United States and we are going to sue in the name of the United States, is a strange contention indeed.

Senator Ervin seems to be saying to us, "L'etat, c'est moi", a remarkable position for him to take.

With regard to Section 1361, the quick answer to that is that it applies only to ministerial duties. The cases we cite at page 31 of our brief show that the ministerial duties can be compelled by mandamus are only those where the officer is under a positive command and so plainly prescribed as to be free from doubt.

Now that can hardly be contended to be the case here. It seems to me the logical implication of the position that you can mandamus a president to produce papers to a congressional committee would have to be that the President has no discretion in the matter at all, that there is no executive privilege. If any element of presidential discretion is recognized then this cannot be the kind of ministerial duty that is compelled under Section 1361.

Finally, the Administrative Procedures Act, I must say that their reply memo at page 17 gave me a start. We have cited three decisions of the Court of Appeals from the District of Columbia in our brief at page 35 to the effect the Administrative Procedures Act is not an independent grant of jurisdiction that is in accordance with majority rules throughout the country. But in the reply memo my friend said the Independent Brokers case, 442 F.2d in this circuit held it is an independent grant of jurisdiction. My first reaction was one of irritation with my associates to whom I delegate the responsibility to shepherdize all the cases they cite because I wondered how we could have missed this most recent case. That faded when I read the Independent Brokers case and found it did not cite any of the three preceding cases from this circuit on point. That seemed odd, seemed unlikely the Court of Appeals would overrule three of its prior decisions without even the courtesy of a passing mention. Then reading fully the Independent Brokers case seemed to me clear Judge Leventhal was not talking to subject matter of jurisdiction at all but in the sense we are here, but the issue in Independent Brokers was whether informal action of the SEC in merely writing a letter was the kind of action reviewable or a secondary issue was if so, was it within the exclusive jurisdiction of the Court of Appeals to review?

Subject matter of jurisdiction existed as the complaint plainly alleges under Section 1331 because this is a case arising

under Constitutional laws of the United States where more than \$10,000 is in controversy. So the jurisdictional issue decided in Independent Brokers, I think, can no way be fairly read as overruling the three explicit statements by the Court of Appeals that the APA is not an independent grant of jurisdiction.

We come back then to Section 1331. On Section 1331 the key issue is whether more than \$10,000 is in controversy. As I understood Mr. Dash's argument he recognizes majority, indeed, virtually the universal rule is that a right that cannot be valued in dollars and cents cannot satisfy the amount in controversy. And he is absolutely correct when he says that in my book I espoused the point of view you look to either plaintiffs or defendant, that is right, that is what I hope to be the law and I submit that neither from the point of view of the Senate Select Committee nor point of view of the President can the value of these tapes be valued in dollars and cents.

The Senate wants to get the tapes in order to hear them, not to sell them, not to publish a book about them. The defendant wants to preserve the tapes in order to preserve the confidentiality of his office, not to take a tax deduction by giving them to the General Services Administration.

So if we accept what I understand to have been the law at least since 1862 in Mississippi-Missouri Railroad vs Ward, that the mountain controversy is the value of the object of the suite.

I submit we have here a case which the value of the object is not quantifiable, it cannot be given any dollar value. I believe the cases that Mr. Dash referred to in his argument that he cites at page 17 in the supplemental memo are all adequately distinguished at pages 24 and 25 of our brief on the grounds that these are cases in which the direct legal effect of the judgment would have involved more dollars to the parties than the statute required.

The second of cases he cites, for example, *Bitterman vs Louisville-Nashville Railroad*, it is in Volume 207 U.S. and not 208 U.S. as cited in the brief, and was a suit by the railroad to prevent ticket agents from reselling tickets. The railroad sold tickets and said these are nontransferable. Agents were buying the tickets up and selling tickets themselves and this was cutting into the railroad's business. There was a clear financial loss to the railroad as the Supreme Court stated, far in excess of jurisdictional amount.

The other cases are cases in which either tax statute or regulatory statute is challenged as unconstitutional and amount in controversy is said to be the amount that is directly required by compliance with the judgment.

But I do not know of any case --Mr. Dash has cited no case-- in which it has been said that we can measure the mountain controversy not by value of the object of the suit but by alternative means we might have to go to if the suit should

be unsuccessful. That essentially is what I think his argument is that it would cost the Committee more than \$10,000 to finish its report if it doesn't have the tapes amounts to. I think there is no authority for that. There is a lot of authority that you may not consider side effects, collateral effects of the decision in determining the amount in controversy. It is only the direct legal effect of the judgment that is to be taken into account.

Particularly instructive on this point, I think, Judge Sirica, is the case of Healy vs Ratta, a Supreme Court case cited at page 25, I think, of our brief. That was a challenge to a tax that the state of New Hampshire imposed on hawkers, people who went around selling merchandise from door to door, in which the Supreme Court held the amount was not in controversy because the only thing that could be regarded in controversy would be amount of tax. The amount of tax you had to pay to be a hawker was \$250 and at that time the statute provided \$3,000 and so if you took into account all the years litigation might extend it could not amount to the required sum. The company has shown that it had tried to avoid the effect of this tax by conducting its business in a different way, that instead of sending its hawkers in actually to make the sale, sent its hawkers in to show the sample and the goods would be shipped from out of state and the hawkers would not be subject to the tax. And when it tried to do its business that way it operated its busi-

at a very substantial loss. The Supreme Court said you can't take that into account, that is not what this suite is about, it is something else. All involved here is the challenge to the tax itself and not the effect it might have on you if you have to do your business in some other way.

There is also an interesting discussion in *Healey vs Rider* and some of the other earlier Supreme Court cases that it said in a suite challenging the tax if the amount of the tax itself is less than the amount the statute requires, it does not matter the penalty for nonpayment of the tax would be more than the amount the statute requires, but if you lose the suite don't pay the tax and then you get fined more than \$10,000 for it that is a collateral effect.

So we do not think the affidavit of Senator Ervin as to the cost the Committee may or may not incur if they lose this case helps them in terms of jurisdiction now, although Mr. Dash didn't refer to it in argument I think in the interest of completeness I should say that at page 18 of his supplemental memo he cites two unreported District Court cases: *Kennedy vs Samson* in this district, and *Holtzman vs Schlessinger* in the Eastern District of New York, for the proposition, and I quote him: "The value of the constitutional rights and duties of legislators satisfied the jurisdictional amount required."

I am very perplexed by the citation of these cases for this proposition. In *Kennedy vs Samson*, in the 29 page

opinion of the Court there is no discussion of jurisdictional amount. In the issues raised in the motion to dismiss there is no listing of amount in controversy as being an issue in the case at all, so it certainly held nothing on the subject and indeed, Kennedy vs Samson seems to me to have been a typical 13611 case and required the administrator of General Services to perform administrative duty of publishing a law.

The case of Holtzman vs Schlessinger, reversed by the Second Circuit, did discuss jurisdictional amount but said nothing about value in the constitutional rights and responsibilities of legislators. It said we can look to the defendant's point of view and it said from defendant's point of view the bombing in Cambodia is costing many millions of dollars, therefore much more than the \$10,000 that the statute requires.

So I do not think that either of those cases support the proposition for which they are advanced.

Even if the constitutional statutory barriers to jurisdiction of this Court could be overcome we would then have to consider whether or not the Senate Committee has authority to bring the suite. And there again, I take a different view from that expressed by my friend.

We have developed at length and I will expound in detail here on the point that a congressional committee, though it has very broad investigative powers and the aid of legislative processes has no power to expose for the sake of exposure. That

I think is very relevant to the passage that you, Mr. Chief Judge read to Mr. Dash early in the argument from Senator Inouye's appearance on Meet the Press, in which he said yes, if this were a criminal investigation we would need the tapes, but for legislative investigation we don't need the tapes in order to write our report.

I received too late to include in our brief the transcript of a discussion that Senator Gurney had on September 16 on the program "Capitol Cloakroom" -- I have an extra copy of the transcript that I will provide for the Court's use, and I apologize, Mr. Dash, they just brought me the transcript this morning and I do not have a copy for your use. (Handed copy to the Court).

The relevant discussion appears at pages 7 and 8.

Leslie Stahl asked Senator Gurney:

"Senator, if we can turn to the question of presidential tapes, do you think they are essential to the investigation that the Senate is conducting?

"SENATOR GURNEY: No. No, I don't. What is our duty anyway? Our duty of course was to charter ... ", there are certain words intelligible --

"to look into facts and circumstances of Watergate that the presidential election of 1972, I should say, and report to the Senate and recommend legislation we thought was necessary in order to improve our political campaigns.



Now getting the presidential tapes really has nothing to do with that charter at all. It does have something to do with who said what, on what day the President met with John Dean or somebody else and it really doesn't have anything to do with what our charter is or interfere with our ability to make recommendations to the Senate to improve campaigns.

"MISS STAHL: Well, then you think you can fully write your final report without the tapes, is that correct?

"SENATOR GURNEY: We can, indeed.

"STRASSER: This testimony would relate to what is commonly called the cover-up. Are you saying this is not part of the Committee's jurisdiction?

"SENATOR GURNEY: In answer to the previous question, of course that was did we need the tapes in order to write our report I said no, we didn't. The tapes would shed light on the Watergate affair, that is true, but that is really not what our charter is and that is to write our report and make recommendations to the Senate."

THE COURT: Let me interrupt you a second. I was about to ask Mr. Dash this question: whether or not he could tell me, and I thought this would not be a fair question because it is not a matter of record, now you have the opinion of Senator Gurney; I don't know how the other members of the Senate might

feel and I don't know whether Mr. Dash knows either. We have at least two members that we know how they feel about this particular matter. All right.

MR. WRIGHT: We do indeed.

And I think, Mr. Chief Judge, that Mr. Dash's argument today simply underscores our argument that the purpose of this proceeding is criminal rather than legislative. Because if I understood Mr. Dash correctly he said that he would agree with two-thirds of our brief, that he and the Committee recognized it was a very broad executive privilege but it is only because there has been prima facie showing of criminal conduct the executive privilege must yield and they must be allowed to get that. That seems to me very odd for the Senate to say, "Yes, we recognize the President is not under enforceable duty to turn over papers to us until there is a prima facie showing we may be able to expose criminal conduct by looking at these papers." That sounds to me like traditionally the work of grand juries rather than work of Senate committees.

We think that the authority of the Committee to pursue the investigation by bringing this action is even more in doubt <sup>enabling</sup> under the resolution that created the Committee.

I will not repeat what we have said at that point at pages 45 to 49 of our brief, but a general resolution that authorizes a committee to subpoena an officer, agent, or employee of the United States is not in common parlance read as meaning

you can subpoena the President of the United States when no subpoenas every before issued from a Senate committee to a President of the United States the Senate must have understood this resolution as merely giving the committees powers they always have had and not giving the committee power too extraordinarily unprecedented as this one would be.

If I heard Mr. Dash correctly, he seemed to concede even the privilege of Congress to preserve confidential papers and not turn them over is not an absolute one, that the Court could compel a congressional committee to give its confidential papers.

We cited some authorities at page 63 of our brief that show the unvarying practice of both houses of Congress has been even that this is not so, that/in criminal investigations they will not produce papers that one or the other house possesses either at the request of the prosecution or at the request of the defense unless the particular house in Congress consents. It regards itself as being the judge and never recognized judicial authority to compel it to produce, so I think the Senators who unanimously voted for Senate Resolution 60 might also be surprised to learn not only they for the first time in history said you may subpoena the President of the United States, but also they have set in motion a proposition that was going to mean the Senate itself is no longer the judge of which of its papers it will produce in response to subpoenas.

For all those reasons, Judge Sirica, we submit that this court lacks jurisdiction of the case. Necessarily, I am now going to go into discussion of the merits of the case, but I do believe that the proper disposition of the case, if our view of it is right, is that the Court dismisses for want of jurisdiction and does not discuss the merits, that if the Court has no jurisdiction any discussion of the merits on the part of the Court would be contrary to the usual way that the courts perform.

THE COURT: Let us pause a moment here.

Assuming, that it decides, of course, that the Court should find there is no jurisdiction in this particular instance here, that of course would end the matter, you wouldn't have to get to the merits. If the Court decided the Court did have jurisdiction then we'd have to consider the merits.

MR. WRIGHT: Correct, sir.

THE COURT: A very, very important question in this case as you realize, Mr. Dash and everybody realizes, is the so-called question of waiver.

Now, when the President of the United States authorized Mr. Dean and Mr. Ehrlichman, I believe, and Mr. Haldeman to go before the Committee and not claim any privilege and testify openly and freely which apparently they did, I take it because you have not answered Mr. Dash's statement of material facts at the beginning of his motion for Summary Judgment, you don't quarrel with those statements, at least you don't admit they are the

truth, but at least you haven't filed any opposition?

MR. WRIGHT: That is correct.

THE COURT: So we start off on that premise.

The question in my mind is this, and probably millions of other persons' minds, when the President of the United States authorized, which he did, I understand, Mr. Dean, Mr. Ehrlich, Mr. Haldeman and whoever else might be involved, to go before the Select Committee and testify truthfully to what they knew about this matter, did not he --and this is the answer I am looking for from you and Mr. Dash-- didn't he in effect waive any privilege that might have existed, or is he in a position today through you as counsel, to claim that he can pick and choose in other words and select certain things and say this is privileged and the other thing is not privileged?

This is one of the things that was in my mind when I was writing the opinion. I couldn't decide the question unless I could hear the tapes to decide that. This is a very interesting and very important question, Mr. Wright, and you know it and everybody else knows it, at the time he waived the privilege, at least the public didn't know about the fact that he had been recording these conversations in his office, that is correct, isn't it, at that time?

MR. WRIGHT: Absolutely, yes, sir.

THE COURT: I would like to hear your argument on the question of whether or not he waived any right to claim absolute privilege under these circumstances in this case.

MR. WRIGHT: We believe that he did not, Mr. Chief Judge. I am trying to locate the page in our brief in which we touch briefly on that. We believe there is no waiver for several reasons.

In the first place, what the President authorized was not for these witnesses to go forth and tell everything they knew about presidential conversations. Their authority was much more limited than that. The President said he would not invoke executive privilege with regard to discussions in his presence of criminal conduct or charges of possible criminal conduct arising out of the Watergate affair.

So the testimony has been limited to a very specific matter on which the President concluded that the public interest suggested that the testimony ought to be permitted.

Now the tapes of course are not so limited. The tapes cover discussions of many different matters, many of them wholly irrelevant to the very limited scope of testimony that President Nixon is aware of.

Second, it is our contention that allowing disclosure of some information by a President is not a waiver of things that the President concludes in the public interest cannot be disclosed, that the President honors executive privilege as Professor Bickel says in the passage quoted on page 51 of our brief, that executive privilege is honored as much when disclosure is made as when disclosure is refused. Indeed, the presumption

must be, I would think, in favor of disclosure. The President would want to respond to the fullest extent possible to requests from courts and from congressional committees to produce information. Secrecy is not the norm in American government, it must be the exception and it must be for the President to draw the line on what the public interest permits and what it does not. And we think in *United States vs Reynolds* is exactly in point on that where the United States said we will not produce these contemporary statements the witnesses made but we will allow the witnesses now to go before you, you can take their deposition.

Any lawyer knows in a personal injury case you would much rather have the contemporaneous statements of witnesses than later testimony. But the Court instead of holding that the offer to make the witnesses now available to testify was a waiver specifically referred to at page 11 of 345 U.S. as a reason for upholding the government's claim that it was privileged and did not have to produce material for in camera inspection. We think that is an absolutely controlling precedent with regard to the claim of waiver. We have not discussed waiver at length in our brief because we thought the waiver contention is so insubstantial.

In his reply memo at page 7 Mr. Dash picks up a phrase the Court used in its opinion when we were here before and says that our conception of separation of powers mainly is one of a watertight allocation of power. If we gave that impression to

the Court when we were here before it was certainly my undoing and I did not intend to do it.

It is perfectly apparent that the system of checks and balances set up by the founders does provide more than one branch of government has a role with regard to many duties. Congress makes laws that the President can veto; Congress can override his veto. A president is subject to impeachment, tried by the Senate, presided over by the Chief Justice; treaties are made by the President and consented to by the Senate. Some examples in which the Constitution very deliberately says we want the combined action by more than one branch of the government.

But the rule of construction that I think has to Chief apply was what Justice Taft announced in *Marders* case, 272 U.S. 52 at page 116. After discussing at very considerable length the importance that the framers attach to the separation of powers and their dedication to the views of minuscule on that, the courts through Chief Justice Taft said: "the reasonable construction of the Constitution must be that the branches must be kept separate in all cases in which they were not expressly blended and the Constitution should be expounded to blend them no more than it affirmatively requires."

That we think is the right approach, yet there is some blending but you don't broaden the blending to the extent the Constitution hasn't expressly blended, you leave them alone.



The main argument on the merits of course is from historical practice, that this is simply something that has never been done before. At page 3 of our brief we have the quotation from Professor Curland, a very distinguished scholar of the Presidency and all of our history, so far as he is aware, hundreds of times presidents have refused to rely on information given to congressional committees and no department head has ever been held to respond to a subpoena or held in contempt for failure to do so.

Now since history is important in this case it is necessary that the Court have a very careful understanding what history is and --

THE COURT: --I think I have read enough about history to have that understanding.

MR. WRIGHT: Well, I want to caution Your Honor against some historical arguments that Mr. Dash's associates made in his brief that seemed to me might be misleading.

Apparently the sole source of my friend's brief on historical issues is the lengthy article by Raul Berger which is cited fifteen times in their brief. They refer to it as a careful and scholarly discussion; they refer again to the fact that Professor Berger takes painstaking care.

Now Professor Berger is a scholar of repute; he has written widely, provocatively and I read him with great interest, but I feel bound to say to the Court that Professor Burger is a

man who once he has adopted a point of view does his best to fit the evidence to support his thesis and I do not regard a statement of history/<sup>made</sup> on authority of Professor Berger as one that can be accepted unless the underlying documentation supports that.

Let me cite two instances of that to the Court. One involves an instance we discussed when Mr. Cox and I were here before. That was the famous subpoena from Chief Justice Marshall to Thomas Jefferson in the Burr case. And Mr. Cox in his argument said ultimately President Jefferson fully complied. That surprised me at the time. I was familiar with Professor Berger's article, I knew that he said Jefferson fully complied. My general understanding though is Jefferson had not fully complied, so in my rebuttal I said I regarded history as inconclusive.

In their historical appendix at page 5 my friend asserts that President Jefferson fully complied, and citing the Berger article and the Berger article does say he, President Jefferson, fully complied.

Since we were here before I have had an opportunity to examine all the original records and I am now in the position to assert categorically to the Court that it is not true that Thomas Jefferson fully complied. His great biographer, indeed idolater, Deveridge --not his, but Marshall's biographer-- would certainly love to record such a triumph as Jefferson

yielding to Marshal in this dispute, but if you look at pages 518 to 522, Volume 38 of Beveridge's life with Marshal, Beveridge rather wistfully says that Jefferson never did comply and Marshal let the matter drop.

What happened finally was this: the documentation can be found in Volume 9 of Ford's writings of Thomas Jefferson at pages 63 and 64.

Ultimately Jefferson took the letter in question, he cut out certain passages of it, he sent the edited version of the letter to the Court with the certificate in which he said the omitted portions were, and I quote: "Passages entirely confidential given for my information in the discharge of my executive functions and which my duties and public interest forbid me to make public. I have therefore, given above a correct copy of those parts which I ought to permit to be made public."

That is certainly not full compliance. It seems to me precisely what President Nixon is doing in this case and this goes squarely against the waiver argument. Jefferson produced what he thought the public interest allowed to be produced. He decided for himself what the public interest did not allow to be produced and he exercised that.

One other historical instance at page 24, second footnote of the original brief of the Senate Committee, again citing Professor Berger's article:

"President Jackson, for example, refused to produce documents relating to alleged wrong-doing by former executive official but only on the ground that the Congressional investigation was being conducted in camera thus depriving the individual in question an opportunity for public vindication."

I happen to have before me the message of President Jackson, February 10, 1835, as appears in Richardson's Messages and Papers of Presidents, Volume 31-32. There is a three-page letter which appears in print. President Jackson first at some length says this is another demand for information the Senate is always making upon me that I think encroaches upon the constitutional powers of the Executive, their continued repetition encroaches upon me as representative and trustee of the American people, the painful duty of resisting to the utmost any further on the rights of the Executive, and he said if you don't like the fact I am not giving you the papers what you ought to do is impeach me. Then after that lengthy discussion there are exactly two sentences in which he makes references to the fact that the papers would be considered in executive session, but then he returns to his other reason. Besides compliance with the present resolution in all probability would subject the conduct and motives of the President in the case of Mr. Fitz to the review of the Senate not sitting as judges on impeachment, etc., etc.

So the statement that Jackson refused compliance only on the ground the papers would be heard in camera is simply a very distorted reading of President Jackson's statement.

I think that the historical practice has been as Professor Corwin described it in the passage I already averted to in page 3 of our brief. I think that the historical practice has been as President Truman described it in his letter of November 12, 1953 when he refused to respond to the subpoena of the UnAmerican Activities Committee. He said: In doing so I am carrying out the provisions of the Constitution of the United States and following a long line of precedents commencing with George Washington himself in 1796. Since his day Presidents Jefferson, Monroe, Jackson, Tyler, Pope, Fillmore, Buchanan, Lincoln, Grant, Hays, Cleveland, Theodore Roosevelt, Coolidge, Hoover, and Franklin D. Roosevelt have declined to respond to subpoenas for demands for information of various kinds for the Congress. He refers to the doctrine of separation of powers, and he said: the doctrine would be shattered and the President, contrary to our fundamental theory of constitutional government would become a mere arm of the Legislative Branch of government if he would feel during his term of office his every act might be subject to official inquiry and possible distortion through political purposes.

That is the historical practice. The House of Representatives acquiesced in that, President Truman refused to do

as Congress has acquiesced over and over again when Presidents have refused information, and we have given a number of instances of those in our brief. We cited even to Senator Ervin and to Senator McClellan acquiescing in Justice Fortas' view in his hearings that he cannot testify about conversations that he held with the President.

There is a suggestion at page 20 of the reply memo that the instances in which this has happened have not been instances in which possible criminal conduct was involved and this for some reason makes a difference. And I simply say this is not true. Without going over every example of a long line of examples we cite in the footnote at pages 52 to 54 of our brief President Monroe in 1825 refused to give information relative to charges of criminal conduct of a naval officer. President Jackson in the letter I just referred to involving Mr. Fitz in 1835 --- it was possible criminal charges. President Tyler in 1848. President Buchanan in 1860, all involving charges of crime, charges which reached high in the Executive Department.

President Truman himself in 1953 when he and Justice Clark refused to appear before the House Un-American Activities Committee were being asked to testify about a charge that they, while they were President and Attorney General, had knowingly promoted a person they knew to be a Communist spy to a high and critical position in government.

I am certain the conduct of that would violate a great many statutes in the criminal code. So the precedent that a President can refuse to produce material to Congress even though possible criminal conduct is involved is, I think, perfectly well established.

We have cited in our brief at pages 55 several of the cases --MidWest Oil case; Inland Waterways case that indicate on constitutional questions of this sort this historical practice is itself something of great importance and we didn't cite in our brief what the other side has cited for a different point in their brief, the Pocket Veto case in 1929. It seemed to me to have a particularly lucid statement of the controlling principal That is at 279 U.S. 655, quotation at 688 and 689. The Court said:

"The views we have expressed as to construction and effect of constitutional provision here in question are confirmed by the practical construction given to it by the President through a long course of years in which Congress has acquiesced. Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character."

Mr. Chief Judge, we respectfully submit that in this case the Court ought honor the long established practice of Presidents acquiesced in by Congress over and over again rather

than being caught up in the spirit of Watergate and setting precedents that would be very damaging to the Presidency.

THE COURT: Thank you, Mr. Wright. Mr. Dash, do you wish to reply?

MR. DASH: Briefly, Your Honor.

I can't resist the reference that apparently we had cited Professor Berger but we have cited at least what he has written in articles. My friend has cited Professor Black as he has given statements to the New York Times and we hear now that he has some hearsay information that Professor Bickel may have told Senator Ervin and me at a meeting and I suggested that kind of newspaper statements or hearsay statements of a professor that may have met with a Senator really is not precedent, and there is so much of his references to Professor Black's New York Times statements that I just feel there really isn't controlling.

I should say in our reference to Professor Berger's statement around Jefferson, we do not say on page 5 of our Motion for Summary Judgment appendix that Jefferson fully complied. A proper and correct reading of what was said is that it is clear that he attempted to fully comply and that he did comply with the subpoena.

So there was no statement that he fully complied. It was an attempt.

Also, I think it is important to start right off briefly in this reply that the historical background is a mixed



bag, and some cases it is true there may be some criminality of some other people where they didn't comply. Other cases they did. I think it is a mixed bag, I don't think we can rely on that.

We have a unique situation here, Your Honor. This is the first time in all these cases where the President himself may be involved. In fact we state and we don't have any denial on the part of the President's counsel that a prima facie case has in fact been made out of presidential involvement. And in that situation there is no special presidential right to protect.

We don't question the executive privilege powers of the President. All these issues and all these statements that Mr. Wright has talked about in terms of presidents not wanting to give up their powers, I said we agree with all that, but certainly this cannot exist, assertion of executive privilege where the President personally is involved. In that particular case he is using executive privilege as a shield for his self protection rather than protection of the presidency or executive privilege.

Now reference has been made to Senator Gurney, and let me say this was the unanimous vote of the entire Senate to bring this suite for these tapes. Off-the-record statements to reporter by Senators I think are completely irrelevant. Senator Gurney received this brief and approved it at executive committee, he and all the Senators unanimously approved my being here today to

argue these positions before Your Honor, or I wouldn't be here. They have the power to tell me not to come here and they could withdraw their position. As recently as yesterday the Committee met and reaffirmed its position before this Committee, and again I suggest that references and off-the-cuff references by Senators as to do we need these tapes, really are to again dispel the view that without the tapes we just fall apart. Frankly, we need the tapes and let me really read the only statement that counts, and that is in the affidavit of Senator Ervin under oath, and I read his paragraph 2 of his affidavit:

"Defendant Richard M. Nixon, President of the United States has refused to honor two subpoena duces tecum submitted to him by the Senate Select Committee that calls for production of evidence vital to the exercise of the Committee's function."

This is the Chairman of the Committee and before signing this he had the approval of the unanimous vote of the Committee, so I don't think there is any question how the Senate Committee members feel.

I suggest, Your Honor, even though this may be somewhat unusual, that it is a Congressional committee that is bringing this action against the Executive it doesn't change the issue on judiciability. Counsel for the President indicates that usually the cases we have cited have been corporations or private

individuals where these issues have arisen. Frankly, it doesn't matter who brings the suite. I don't see why a Committee of the Congress cannot bring a suite to enforce its subpoenas for declaratory judgment if it is a justiciable issue. And the question that Powell vs McCormack and David vs Soucie is the definition on a political question is whether or not there is a textually demonstrable commitment and here we say here there is none, executive privilege is not a textually demonstrable commitment to the President and since Your Honor has ruled, and I think other courts have ruled, that is reviewed by the courts, why can't a committee come into court also as a corporate president or anybody else.

Again, he is confusing a political case perhaps with a political question. We suggest that is not so.

He makes a reference again to our use of the Independent Brokers case as now being the rule in the Second Circuit with regard to our use of the Administrative Procedures Act jurisdiction. That in itself provides jurisdiction. And he indicates that there was no reference to the earlier cases. That of course, the fact that a later decision doesn't refer to earlier cases does not mean that its latest decision does not overrule those cases. But also what they said in that particular case I read directly: "We sustain the jurisdiction in the District Court on the ground this agency involvement constitutes agency action within the meaning of the APA, and alternatively by reference to the Court's

general equity jurisdiction." So there were two basis for jurisdiction. Surely there was another base. But as an alternative basis for jurisdiction they found that the APA is an independent basis for jurisdiction. Therefore, I submit, Your Honor, that it does.

Now, I had answered Your Honor's question as to whether it was minority or majority view on 1331, whether it is a minority view concerning the amount in controversy where you can't place a dollar amount on it and what I was conceding, Your Honor, was it is from the minority view if you can't place a dollar amount then automatically the Court will treat in a constitutional rights case as meeting the amount in controversy. But it is the majority view, Your Honor, we cite the Spock case and some other cases which say that you can consider where constitutional rights are involved, you can consider them for the question of the amount in controversy.

Now just one or two other points that I think it should be emphasized too that the question here of the exception to the Executive Privilege Rule where criminality is involved has been deeply conceded by the President's counsel and he doesn't raise it. What he again argues and presses before this Court he says it is the Watergate atmosphere.

I have to stress, Your Honor, that again, the unanimous vote of the Senate was to create a Senate Select Committee on Presidential Campaign Activities and the President's counsel

treats lightly the responsibility of the mandate. There is no exposure for exposure's sake. The President, even though he holds the highest executive position in the land, and deserves the highest respect of all Americans, still is a citizen under the law and in the area of presidential campaign activities where he is a candidate for the presidency, he comes within the legislative jurisdiction of the Congress and it is in this particular area that we are investigating. And as I have indicated, where a prima facie case has in fact been made out by a witness under oath before a committee of criminality of the President, then it is the responsibility of our committee to take the facts and findings for perhaps drastic legislation and I don't see how the President's counsel can ignore that because the very heart and future of our democratic electoral process depends on whether or not there can be such a corruption of a electoral process as we have seen in the past; and therefore, it may call for the Committee to make such recommendations and the Committee can only make these recommendations if it finds these facts and it must pursue it as far as it can and it has the jurisdiction to do so.

I will not take the time of the Court to take on a number of other issues which were raised by Mr. Wright. I think all of these arguments have been fully presented to Your Honor, have been fully briefed, and I think the matter is ripe for resolution.

We do ask Your Honor to resolve these matters as quickly as can be even though we have filed an amicus in the Court of Appeals, the Court of Appeals cannot resolve our issues of jurisdiction, and we do present a different case because whereas the Special Prosecutor was not relying primarily as we do and directly on the involvement of the President himself because he has a particular problem in terms of how far he can go in terms of prosecution. The legislative process can look into that matter for determining what legislation it should draft even though it cannot obviously prosecute the President, and therefore we need the resolution of this case as early as possible even if the Court of Appeals has not yet resolved it.

THE COURT: The Court desires to consider this matter further before rendering a decision, and will therefore take the matter under advisement for the time being.

Both counsel ought to be congratulated on the excellent presentations made this morning and in the written briefs.

The Court deeply appreciates the assistance of counsel on both sides.

If there is nothing further the Court will now adjourn.

\* \* \* (12:25 p.m.)

CERTIFICATE

It is certified that the foregoing is the official transcript of proceedings indicated.

*Nicholas Sokal*  
NICHOLAS SOKAL  
Official Reporter

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES, suing in its own  
name and in the name of the United States,

and

SAM J. ERVIN, JR.; HOWARD H. BAKER, JR.;  
HERMAN E. TALMADGE; DANIEL K. INOUE;  
JOSEPH M. MONTAYA; EDWARD J. GURNEY;  
and LOWELL P. WEICKER, JR., as United  
States Senators who are members of  
the Senate Select Committee on  
Presidential Campaign Activities,

Plaintiffs,

v.

RICHARD M. NIXON, individually and as  
President of the United States,

Defendant.

Civil Action No. 1593-73

O R D E R

This matter having come before the Court on plaintiffs' Motion for Summary Judgment, and the Court having considered the memoranda and arguments of counsel, and the Court having concluded for the reasons stated in the attached opinion that it lacks jurisdiction over this matter, it is by the Court this 17th day of October, 1973,

ORDERED that this action be, and the same hereby is, dismissed with prejudice.

John F. Sirica  
Chief Judge

FILED  
OCT 17 1973  
JAMES F. DAVEY, Clerk

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES, suing in its own  
name and in the name of the United States,

and

SAM J. ERVIN, JR.; HOWARD H. BAKER, JR.;  
HERMAN E. TALMADGE; DANIEL K. INOUE;  
JOSEPH M. MONTOYA; EDWARD J. GURNEY; and  
LOWELL P. WEICKER, JR., as United States  
Senators who are members of the Senate  
Select Committee on Presidential Campaign  
Activities,

Plaintiffs,

v.

RICHARD M. NIXON, individually and as  
President of the United States,

Defendant.

Civil Action No. 1593-73

FILED  
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JAMES F. DAVEY, Clerk

OPINION

The Court presently has before it a motion for summary judgment filed by plaintiffs. Plaintiffs are the Senate Select Committee on Presidential Campaign Activities, established by Senate Resolution 60, 93rd Congress, 1st Session (1973), and the seven United States Senators who compose the Select Committee. Richard M. Nixon, President of the United States, is defendant. The action is styled "Complaint for declaratory judgment, mandatory injunction and mandamus."

Facts concerning the origin of this action are not controverted. The Senate Select Committee on Presidential Campaign Activities (Select Committee) became a duly authorized and constituted committee of the United States Senate on February 7, 1973, "empowered to investigate and study 'illegal, improper or unethical activities' in connection with the Presidential campaign and election of 1972 and to determine the necessity of new



legislation 'to safeguard the electoral process by which the President of the United States is chosen.'" <sup>1/</sup> In the course of its investigatory procedures, the Select Committee heard one Alexander P. Butterfield, formerly a Deputy Assistant to the defendant. Mr. Butterfield testified that the President had electronically recorded conversations occurring in various of his offices during a period of time that included the campaign and election of 1972. This testimony was later confirmed by Presidential counsel, J. Fred Buzhardt. <sup>2/</sup>

Upon learning that among these recorded conferences were a series which they regarded as highly relevant to their investigation, plaintiffs commenced informal efforts to secure the pertinent tape recordings as well as various written documents. Plaintiffs were and remain convinced that the recorded account of these presidential conversations, together with written White House documents alluded to by witnesses at their hearings, would undoubtedly contain information having an important bearing on their investigation and would probably resolve critical conflicts in the testimony of several key witnesses.

When informal attempts proved unsuccessful, the Select Committee directed two subpoenas duces tecum to the defendant President. Both were served on July 23, 1973, and together with proof of service, are attached as exhibits to the complaint herein.

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<sup>1/</sup> "Statement of Material Facts as to which there is no Genuine Issue" filed by plaintiffs on August 29, 1973, at 1. Counsel for the defendant President acknowledged in Court on October 4, 1973, that defendant takes no issue with plaintiffs' statement.

<sup>2/</sup> Id. at 2.

The first required production of the tape recordings of five meetings which were in each instance attended by the defendant President and then White House counsel, John W. Dean, III.

Other persons had also been present during some of these conferences. As noted in the subpoena, the meetings occurred on September 15, 1972, February 28, 1973, March 13, 1973, and March 21, 1973, with two meetings on the last mentioned date.

The second subpoena sought documents and other materials "relating directly or indirectly to [an] attached list of [25] individuals and to their activities, participation, responsibilities or involvement in any alleged criminal acts related to the Presidential election of 1972." Defendant filed no objection to either subpoena or to service thereof, although in a subsequent filing counsel have characterized the second subpoena as oppressive. Defendant's sole ~~response~~ consisted of a letter to Select Committee Chairman Senator Sam J. Ervin, Jr., expressing the President's intention not to comply with the subpoenas and the reasons for his decision. The President's letter is also appended to the complaint herein as an exhibit. It is understood that although the subpoenaed tape recordings had previously been in the custody of others, at the time the subpoenas were issued, and at present, they are within the sole possession, custody and control of the defendant President.<sup>3/</sup>

Plaintiffs next proceeded to file with the Court the present civil action. They deliberately chose not to attempt an adjudication of the matter by resort to a contempt proceeding under Title 2, U.S.C. § 192, or via Congressional common-law powers which permit the Sergeant at Arms to forcibly secure attendance of the offending party. Either method, plaintiffs

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<sup>3/</sup> Id. at 3.

state, would here be inappropriate and unseemly. On the day defendant filed his answer to the complaint, plaintiffs submitted a motion for summary judgment. A response to the motion and other memoranda were subsequently filed, and the matter came on for oral argument on October 4, 1973. In their subsequent pleadings and at oral argument, plaintiffs have emphasized that portion of the complaint which seeks a declaratory judgment. It is argued that such judgment include the following statements:

- (1) That the two subpoenas were lawfully issued and served by plaintiffs and must be complied with by defendant President;
- (2) That defendant President may not refuse compliance on the basis of separation of powers, executive privilege, Presidential prerogative or otherwise;
- (3) That defendant President by his action to date has breached the confidentiality of the materials subpoenaed and waived any privilege that might have applied to them.

The prayer for a mandatory injunction and/or relief by way of mandamus has been referred to the Court's discretion and otherwise ignored by plaintiffs.

The case presents a battery of issues including jurisdiction, justiciability, invocation of the declaratory judgment statute, executive privilege, waiver of privilege, validity of the Select Committee's investigation, and authority of the Select Committee to subpoena and bring suit against the President. Because of its ruling, the Court has found it necessary to consider only one question, that being whether the Court has jurisdiction to decide the case. The Court has concluded, for the

reasons outlined below, that it lacks such jurisdiction, and the action is therefore dismissed with prejudice.

# I.

The Court has recently decided another case involving some of the same tape recordings that are here at issue.<sup>4/</sup> As its caption indicates, that matter concerned a subpoena duces tecum issued to the President by a grand jury. It was there ruled that compliance with the subpoena could be judicially required as to unprivileged matter and that the Court was empowered to determine the applicability of any privilege. The case is presently the subject of appellate review.

This present case, by contrast, is a civil complaint, and in such actions particularly, jurisdiction is a threshold issue. Some elementary principles perhaps need restating here. For the federal courts, jurisdiction is not automatic and cannot be presumed. Thus, the presumption in each instance is that a federal court lacks jurisdiction until it can be shown that a specific grant of jurisdiction applies. Federal courts may exercise only that judicial power provided by the Constitution in Article III and conferred by Congress. All other judicial power or jurisdiction is reserved to the states. And although plaintiffs may urge otherwise, it seems settled that federal courts may assume only that portion of the Article III judicial power which Congress, by statute, entrusts to them.<sup>5/</sup> Simply

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<sup>4/</sup> In Re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon, etc., 360 F. Supp. 1 (D.D.C. 1973).

<sup>5/</sup> The Supreme Court and the Court of Appeals for this Circuit have affirmed that jurisdiction fails "if the cause is not one described by any jurisdictional statute." Powell v. McCormack, 395 U.S. 486, 512-513 (1969) citing Baker v. Carr, 369 U.S. 186, 198-199 (1962). See also, Cary v. Curtis, 3 How. (continued to next page)

stated, Congress may impart as much or as little of the judicial power as it deems appropriate and the Judiciary may not thereafter on its own motion recur to the Article III storehouse for additional jurisdiction. When it comes to jurisdiction of the federal courts, truly, to paraphrase the scripture, the Congress giveth, and the Congress taketh away.<sup>6/</sup> Finally, the principle is firmly established that jurisdictional requirements cannot be waived.

## II.

Plaintiffs have cited four statutory bases any and all of which, according to their submission, grant jurisdiction here. Before proceeding to analyze these provisions, however, it should be noted that the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and Rule 57 of the Federal Rules of Civil Procedure do not themselves confer jurisdiction. These statutes, as defendant points out, are procedural only and do not constitute the jurisdictional statute necessary to consideration of a specific declaratory judgment action.<sup>7/</sup>

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<sup>5/</sup> (continued) (44 U.S.) 236, 245 (1845) and United States Servicemen's Fund v. Eastland, \_\_\_ F.2d \_\_\_ (No. 24,279 August 30, 1973) (D.C. Cir. 1973). Reference to Article III, § 2 alone is insufficient.

For the contrary proposition plaintiffs cite six decisions: New York Times Co. v. U.S., 403 U.S. 713 (1971); Sanitary District of Chicago v. U.S., 266 U.S. 405 (1925); In Re Debs, 158 U.S. 564 (1895); U.S. v. Arlington County, 326 F.2d 929 (4th Cir. 1964); U.S. v. Brand Jewelers, Inc., 318 F. Supp. 1293 (S.D.N.Y. 1970); and U.S. v. Brittain, 319 F. Supp. 1058 (N.D. Ala. 1970). None of these cases, however, holds that the government or anyone else may invoke jurisdiction of the federal courts without utilizing a specific jurisdictional statute. Each were initially brought by the United States and jurisdiction apparently invoked under 28 U.S.C. § 1345, or its predecessor, an independent statutory base applicable to the government.

<sup>6/</sup> Job 1:21 (The Holy Bible)

<sup>7/</sup> See, Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950) and Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 249 (1937).

A

One of the four statutory bases of jurisdiction cited by plaintiffs is 28 U.S.C. § 1345 which reads:

§ 1345. United States as plaintiff

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

Plaintiffs have disclaimed any attempt to classify themselves as an "agency or officer" within the meaning of this section. Rather they purport to bring suit in the name of the United States. Reference, however, to common practice and related statutory provisions belies the soundness of such a claim. Title 28 U.S.C. § 516, in language similar to that of § 1345, reserves to the Attorney General and Department of Justice authority to litigate as United States.

§ 516. Conduct of Litigation reserved to Department of Justice

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

While this section does not require a congressional litigant to be represented by the Justice Department, it does deny such a litigant the right to sue as the United States when jurisdiction derives from § 1345. <sup>8/</sup> The practice has never been otherwise

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<sup>8/</sup> Cf., Confiscation Cases, 7 Wall (74 U.S.) 454, 457 (1868). It may be argued that Senate Resolution 262, 70th Congress, 1st Session (1928) permits the Select Committee to sue in the name of the United States here despite the provisions of § 516. Resolution 262 states in pertinent part:

[A]ny committee of the Senate is hereby authorized to bring suit on behalf of and  
(continued to next page)

and the two cases cited by plaintiffs do not so hold.<sup>9/</sup> Section 1345 is simply inapplicable here.

8/ (continued)

in the name of the United States in any court of competent jurisdiction if the committee is of the opinion that the suit is necessary to the adequate performance of the powers invested in it or the duties imposed upon it. . . .

It occurs to the Court that there are at least three responses which answer this claim. First, insofar as the Senate Resolution is inconsistent with the provisions of § 516, it would appear that the statute, enacted by both Houses of Congress, should control over the Resolution of one House. Second, any exception to § 516 must be one "authorized by law." Although the question has never been specifically litigated, it seems apparent that "law" in § 516 would not include a legislative action of the sort represented by S. Res. 262. The term "law" does not normally encompass within its definition "resolution," and all recognized exceptions to § 516, such as 10 U.S.C. § 1037, are statute laws enacted by both Houses. In addition, the Supreme Court has hinted that authorization of legislative committees to sue as the United States under § 1345 may require a specific statutory enactment. The Court in *Reed v. County Commissioners*, 277 U.S. 376 (1928), did not reach the question of whether a Senate committee could act as the United States under 28 U.S.C. § 41 (predecessor to 28 U.S.C. § 1345), because "even if it be assumed that the Senate alone may give that authority," it had not even attempted to do so. 277 U.S. at 388 (emphasis added).

Third, and most importantly, the language and historical setting of S. Res. 262 exact the conclusion that it was intended, not to confer jurisdiction, but to ensure standing in lawsuits. Both parties agree that the Senate adopted S. Res. 262 in response to the Supreme Court decision in *Reed*. As just noted, the *Reed* Court did not reach the issue of statutory jurisdiction because it found that the Senate Special Committee lacked standing. 277 U.S. at 388. S. Res. 262 was intended to correct that defect, and thus it authorized committees to sue "in any court of competent jurisdiction." This language traditionally means courts that already have jurisdiction, that are presently competent to consider the case, pursuant to some independent statutory provision. It does not itself serve to bestow jurisdiction.

9/ Plaintiffs cited *In Re Hearings* by the Committee on Banking and Currency, 245 F.2d 667 (7th Cir. 1957) and *In Re Hearings* by the Committee on Banking and Currency, 19 F.R.D. 410 (N.D. Ill. 1956).

A second statute called to the Court's attention is 28 U.S.C. § 1361. That statute provides:

§ 1361. Action to compel an officer of the United States to perform his duty.

The district courts shall have original jurisdiction of any action in the nature of a mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

In attempting to meet the terms of § 1361, plaintiffs impute to the defendant President a "legal duty to respond to and to comply with . . . [Select Committee] subpoenas." As defendant indicates, however, the traditional criteria for mandamus proceedings apply here <sup>10/</sup> and only a "ministerial, plainly defined and peremptory" duty may properly be the subject of such proceedings.

Before such a writ may issue, it must appear that the claim is clear and certain and the duty of the officer involved must be ministerial, plainly defined, and peremptory. Huddleston v. Dwyer, 10 Cir. 145 F.2d 311. The duty sought to be exercised must be a positive command and so plainly prescribed as to be free from doubt. Wilbur v. United States ex rel. Kadrie, 281 U.S. 206, 50 S.Ct. 320, 74 L.Ed. 809. <sup>11/</sup>

These criteria have not been satisfied.

After reading cases that have considered applications for mandamus, the Court cannot in good conscience hold that any duty defendant may have as President is "plainly defined and

<sup>10/</sup> See, Senate Report No. 1992, 87th Cong., 2nd Sess. pp. 2-4 (1962). 28 U.S.C. § 1361 did not create a new or distinct cause of action.

<sup>11/</sup> Prairie Band of Potawatomie Tribe of Indians v. Udall, 355 F.2d 364, 367 (10th Cir.) cert. denied 385 U.S. 831 (1966).



peremptory" as that phrase has been interpreted. <sup>12/</sup> Mandamus properly issues to enforce such duties as that of a government officer to issue a driver's or marriage license when all licensing requirements are met or that of a military official to confer an honorable discharge where the law so provides. In every case, official duties are involved. No analogous obligation appears here. Regardless of whatever duty the President may owe the Select Committee as a citizen with evidence in his possession, it is not "free from doubt" that his official responsibilities require compliance. There is nothing in the Constitution, for example, that makes it an official duty of Presidents to comply with Congressional subpoenas. <sup>13/</sup>

A fair reading of § 1361 cannot sustain jurisdiction here.

<sup>12/</sup> See e.g., *Harmon v. Brucker*, 355 U.S. 579 (1958); *McGaw v. Farrow*, 472 F.2d 952 (4th Cir. 1973); *Spock v. David*, 467 F.2d 1047 (3rd Cir. 1972); *United States v. Walker*, 409 F.2d 477 (9th Cir. 1969); *Greffanti v. Hershey*, 296 F. Supp. 553 (S.D. N.Y. 1969); *Switzerland Co. v. Udall*, 225 F. Supp. 812 (W.D.N.C. 1964) aff'd, 337 F.2d 56 (4th Cir. 1964) cert. denied 380 U.S. 914 (1965).

<sup>13/</sup> Plaintiffs misread the prior opinion of this Court when they think they find a declaration therein that Presidents have a duty, ministerial in nature, to comply with subpoenas. The Court rather stated that defendant's obligation to produce unprivileged evidence was "more akin to a ministerial duty" than to a discretionary one, "if indeed it concerns official duties at all." In *Re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon, etc.*, 360 F. Supp. 1, 8 n.21 (D.D.C. 1973). (emphasis added). In sustaining the Court's position in that case, the Court of Appeals for this Circuit characterized the responsibility of the President to produce evidence as one of the "routine legal obligations that confine all citizens." *Nixon v. Sirica*, \_\_\_ F.2d \_\_\_ (No. 73-1962 October 12, 1973) (D.C. Cir. 1973), at page 18 slip opinion.

C

As a third statutory basis of jurisdiction, plaintiffs cite the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

There is some question whether the President is an "agency" for purposes of the Act, <sup>14/</sup> whether "agency action" is involved here, <sup>15/</sup>

<sup>14/</sup> Plaintiffs cite Amalgamated Meat Cutters & Butcher Workmen v. Connally, 337 F. Supp. 737 (D.D.C. 1971), the decision of a three judge court written by Circuit Judge Leventhal, as definitively establishing that the President is an "agency" for purposes of the statute. As the Court reads that decision, however, and as defendant suggests, that issue was specifically left open. The opinion does include the following statement cited by plaintiffs:

The leading students of the APA, whose analyses are often cited by the Supreme Court, and who on some matters are in conflict with each other, seem to be in agreement that the term "agency" in the APA includes the President -- a conclusion fortified by the care taken to make express exclusion of "Congress" and "the Courts." 337 F. Supp. at 761 (footnote omitted).

Nevertheless, in the next sentence the court writes:

But we need not consider whether an action for judicial review can be brought against the President eo nomine. 337 F. Supp. at 761.

The Court of Appeals in this Circuit has also left open this question. See, Soucie v. David, 448 F.2d 1967, 1073 n.17 (D.C. Cir. 1971). Defendant further notes, "it is hard to imagine that a statute that excludes from its operations even the governments of the territories and the Mayor of the District of Columbia should be held to have included, in its bland and neutral language, the President of the United States." Brief in Opposition at 33 n.7.

<sup>15/</sup> "Agency action" is defined by the statute as "the whole or a part of any agency rule, order, license, sanction, relief or the equivalent or denial thereof, or the failure to act." 5 U.S.C. § 551 (13). Plaintiffs cite this language as aptly describing "the President's failure to turn over the evidence which the Committee has demanded. \*\*/" \*\*/ In fact, the term 'adjudication' as defined by the APA, could well apply to the President's action. See 5 U.S.C. § 551 (6 and 7)." Reply Memorandum at 18. Defendant interprets the same definition as applicable only to the "rule-making" and "formulation of orders" functions of agencies, categories into which his actions do not fall. Brief in Opposition at 33, 34.

and whether plaintiffs have suffered a "legal wrong" within the meaning of these provisions. <sup>16/</sup> A final resolution of these problems,

however, is unnecessary here since the rule in this Circuit precludes use of this Act altogether as an independent basis of jurisdiction. <sup>17/</sup>

The Administrative Procedure Act does not confer jurisdiction where an action is not otherwise cognizable by the federal courts. Plaintiffs have urged that although this was once the rule in the District of Columbia, the Independent Broker-Dealers' Trade Association v. SEC case at 442 F.2d 132 (D.C. Cir. 1971), cert. denied 404 U.S. 828 (1972) has effectively overruled the earlier position. The Court does not so read

<sup>16/</sup> 5 U.S.C. § 702 provides:

A person suffering legal wrong because of agency action or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

The plaintiffs claim a legal right of the Committee to have its lawful subpoenas obeyed by the President and cite principally Watkins v. U.S., 354 U.S. 178 (1957) and McGrain v. Daugherty, 273 U.S. 135 (1927). Supplemental Memorandum at 27; Reply Memorandum at 18, 19. Defendant maintains that although plaintiffs may have cited an adverse effect, they have not pointed to an illegal effect recognized by law. He cites Senate Report No. 752, 79th Congress, 1st Session (1945) at 26, and Kansas City Power & Light Co. v. McKay, 225 F.2d 924 (D.C. Cir.) cert. denied 350 U.S. 884 (1955). Brief in Opposition at 34.

<sup>17/</sup> See Pan American World Airways, Inc. v. CAB, 392 F.2d 483, 494 (D.C. Cir. 1968); Kansas City Power & Light Co. v. McKay, 225 F.2d 924, 932-933 (D.C. Cir.) cert. denied 350 U.S. 884 (1955); Almour v. Pace, 193 F.2d 699, 701 n. 5 (D.C. Cir. 1951). Such is the rule in other circuits as well. See, e.g., Arizona State Dept. of Public Welfare v. Dept. of Health, Education and Welfare, 449 F.2d 456, 464 (9th Cir. 1971), cert. denied 405 U.S. 919 (1972); Zimmerman v. United States Government, 422 F.2d 326, 330-331 (3rd Cir.), cert. denied 399 U.S. 911 (1970); Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529, 532 (8th Cir. 1967); Chournos v. United States, 335 F.2d 918, 919 (10th Cir. 1964); Local 542, International Union of Operating Engineers v. NLRB, 328 F.2d 850, 854 (3rd Cir.), cert. denied 379 U.S. 826 (1964); Ove Gustavsson Contracting Co. v. Floete, 278 F.2d 912, 914 (2d Cir.), cert. denied 364 U.S. 894 (1960).

Independent Broker-Dealers. Plaintiffs there enjoyed an independent basis for jurisdiction in 28 U.S.C. § 1331, and the ruling concerned not whether the APA itself affords jurisdiction but whether the SEC's informal act was reviewable and whether any such review might be had in the District Court. The Court held that an SEC letter to the New York Stock Exchange requesting that the Exchange prohibit "customer-directed give-ups" constituted judicially reviewable "agency action." The Court agrees with defendant's counsel that it is hardly probable the Court of Appeals would overrule its prior decisions without any reference to them.

The Court concludes that the Administrative Procedure Act cannot serve to grant jurisdiction here.

D

Plaintiffs have placed principal reliance for purposes of jurisdiction on 28 U.S.C. § 1331. That statute, often termed the "federal question" jurisdiction statute, provides in pertinent part as follows:

§ 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000 exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

Unlike the statutes heretofore discussed, this provision includes a monetary sum or value as an incident of jurisdiction, the \$10,000 jurisdictional amount. Although the amount has varied over the years, defendant is correct in his assertion that whatever

the sum, it is a jurisdictional prerequisite.<sup>18/</sup> The satisfaction of a minimum amount-in-controversy is not a technicality; it is a requirement imposed by Congress which the courts may not dispense with at their pleasure.

While some decisions have held to the contrary, most notably Spock v. David, 469 F.2d 1047 (3rd Cir. 1972), it is the near-universal view that a right or matter in controversy must be capable of valuation in dollars and cents to sustain jurisdiction under § 1331.<sup>19/</sup> To the Court, this constitutes not only the majority but the more realistic analysis of the amount-in-controversy requirement. Where it desires to award jurisdiction over cases involving important rights without regard to a monetary valuation, the Congress is capable of excluding such restrictions; witness, for example, the civil rights and elective franchise statute at 28 U.S.C. § 1343. Thus, where Congress has required a jurisdictional sum, it would seem unwarranted for a court to presume that the limitation was unintentional.<sup>20/</sup>

The question therefore become whether a quantifiable amount-in-controversy, of sufficient value to satisfy the statutory

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<sup>18/</sup> See, e.g., Holt v. Indiana Mfg. Co., 176 U.S. 68 (1900) and U.S. v. Sayward, 160 U.S. 493 (1895).

<sup>19/</sup> See, e.g., Barry v. Mercein, 5 How. (46 U.S.) 103 (1847); McGaw v. Farrow, 472 F.2d 952 (4th Cir. 1973); Kheel v. Port of New York Authority, 457 F.2d 46 (2nd Cir. 1972); Goldsmith v. Sutherland, 426 F.2d 1395 (6th Cir.) cert. denied 400 U.S. 960 (1970); Rosado v. Wyman, 414 F.2d 170 (2nd Cir. 1969), reversed on other grounds 397 U.S. 397 (1970); Rapoport v. Rapoport, 416 F.2d 41 (9th Cir. 1969) cert. denied 397 U.S. 915 (1970); Giancana v. Johnson, 335 F.2d 366 (7th Cir. 1964) cert. denied 379 U.S. 1001 (1965).

<sup>20/</sup> Defendant states that Congress has had before it several times legislation "rewriting the statute to remove the amount in controversy requirement in cases in which constitutional rights are asserted against federal officers," but has each time failed to enact it. Brief in Opposition at 25.

minimum, exists here. The parties agree, and it is well settled that in determining the amount-in-controversy, reference to either party's situation is appropriate. Where the case is worth at least \$10,000 to the defendant, the requirement is satisfied just as fully as where a plaintiff can demonstrate the \$10,000 value or sum.

Computations measure the "value of the object" of the suit, Mississippi & Missouri R.R. Co. v. Ward, 2 Black (67 U.S.) 485 (1862), that is the monetary value of objects at issue or direct monetary impact of an adjudication. The object here could be described as either the tapes and documents themselves or as access to the information contained therein. Since intrinsically, the tape recordings and documents do not approach a \$10,000 value, we look instead to the value of a disposition either granting or denying the declaratory judgment and other relief sought.

Plaintiffs suggest several possible analyses by which existence of the required minimum value may be established. It appears to the Court, however, that none of these proposals suffice. First, in an affidavit of the Select Committee Chairman appended to their Supplemental Memorandum, plaintiffs calculate the expenses they will incur if compelled to secure from other sources the information contained in the subpoenaed materials. Though the Court does not dispute this assessment, it nevertheless cannot accept such indirect costs as the amount-in-controversy. Alternative means of achieving the object of a suit or collateral results of a judgment are not properly considered in computing the jurisdictional minimum <sup>21/</sup> under § 1331. The cost of added Committee work to ferret out

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<sup>21/</sup> See, e.g., Healy v. Ratta, 292 U.S. 263 (1934); Lion Bonding & Surety Co. v. Karatz, 262 U.S. 77 (1923); Town of Elgin v. Marshall, 106 U.S. 578 (1882); Quinalt Tribe of Indians v. Gallagher, 368 F.2d 648 (9th Cir. 1966) cert. denied 387 U.S. 907 (1967).  
(footnote continued to next page)

the desired information is quite clearly the cost of an alternative procedure. Nor is the Select Committee's appropriation of a valid measure. The decision in Williams v. Phillips, \_\_\_\_ F. Supp. \_\_\_\_ (D.D.C. 1973, C.A. No. 490-73), the only authority cited for this proposition, contains no such holding. Plaintiffs have not attempted to quantify the direct impact of a judicial decision, and indeed, it appears to the Court that such an appraisal is impossible from either party's viewpoint.

Second is a suggestion that the rights and responsibilities of legislators exceed the \$10,000 minimum. The restriction to a dollars and cents evaluation of the matter in controversy, however, logically precludes an assumption that the value of such a right can satisfy § 1331. The value of the right or duty must be quantifiable. <sup>22/</sup> There must be some financial gain or loss

<sup>21/</sup> (continued)

For the contrary proposition plaintiffs cite Petroleum Exploration Co. v. Public Service Commission, 304 U.S. 209 (1938); Bitterman v. Louisville & Nashville R.R., 207 U.S. 205, 224-25 (1907); and Federated Mutual Implement & Hardware Ins. Co. v. Steinhilber, 268 F.2d 734 (8th Cir. 1959). In each of these instances, however, parties stood to suffer monetary losses in excess of the jurisdictional amount as the direct result of a judgment. In Petroleum Exploration it was the expense a Maine corporation would incur if forced to appear and give information pursuant to an order of the Kentucky Public Service Commission. In Bitterman, it was a railroad's financial loss if ticket sales by brokers were not enjoined. The Federated Mutual case concerned losses that would befall an insurance company if a former sales agent were not restrained from competing in the insurance business for two years.

<sup>22/</sup> Plaintiffs urge that Kennedy v. Sampson, (D.D.C., C.A. 1583-72, August 16, 1973) and Holtzman v. Richardson (E.D.N.Y., 73-C-537, July 25, 1973) reversed \_\_\_\_ F.2d \_\_\_\_ (2nd Cir. 1973) found that the constitutional rights and duties of legislators met the monetary requirement of § 1331. This conclusion, however, seems inaccurate. Kennedy did not discuss jurisdiction but was apparently a § 1361 case (performance of a ministerial duty). In Holtzman, the object of the controversy from defendants' viewpoint (bombing in Cambodia) far exceeded the \$10,000 jurisdictional sum. As plaintiffs note, a court in this district has apparently ruled that the inherent value of a constitutional right to vote "must be equal to any amount set for jurisdictional purposes." (continued to next page)

associated directly with sustaining, rejecting or declaring the right. The Supreme Court has only recently reminded us that in suits against federal officials under § 1331, "it is necessary to satisfy the amount-in-controversy requirement for federal jurisdiction." Lynch v. Household Finance Corp., 405 U.S. 538, 547 (1972). Any direct financial consequence to rights or duties is not apparent in this case.

Finally, regarding value from defendant's viewpoint, the Court cannot find any basis on which to assign a dollar value to the matter in controversy. Just as the constitutional obligations of legislators, defendant's interest, whatever it may be termed, is incapable of such an appraisal. Each of plaintiff's assertions, then, regarding the amount-in-controversy are legally inadequate, and finding no possible valuation of the matter which satisfies the \$10,000 minimum, the Court cannot assert jurisdiction by virtue of § 1331.

No jurisdictional statute known to the Court, including the four which plaintiffs name, warrants an assumption of jurisdiction, and the Court is therefore left with no alternative here but to dismiss the action.

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22/ (continued) West End Neighborhood Corporation v. Stans, 312 F. Supp. 1066, 1068 (D.D.C. 1970). This Court, however, cannot justify a conclusion that the Stans decision represents the law in this or any Circuit with the possible exception of the Third, and accordingly, with due respect, cannot regard that precedent.

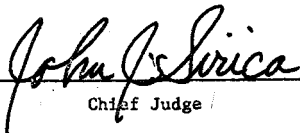
To say that constitutional rights are incapable of a monetary assessment is not to say that they are petty or worthless. All persons realize, or should realize, that their value is unsurpassed. Such value, however, is simply not the type intended to satisfy the monetary restrictions of § 1331. Other statutes may grant jurisdiction in some of these cases, but § 1331 does not.



## III.

Because of its conclusion and disposition, the Court does not reach the problem of justiciability or the merits of the case. Any comment on these matters therefore is inappropriate, and the Court does not proffer its views.

The Court has here been requested to invoke a jurisdiction which only Congress can grant but which Congress has heretofore withheld. Whether such jurisdiction ought to be conferred is the prerogative of the Congress. Plaintiffs, of course, are free to pursue whatever remedy they now deem appropriate, but the Court cannot, consistent with law and the constitutional principles that reserve to Congress the conferral of jurisdiction, validate the present course.

  
Chief Judge

October 17, 1973

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES, et al

Plaintiffs

v.

RICHARD M. NIXON,  
individually and as President of the  
United States

Defendant

FILED

OCT 19 1973

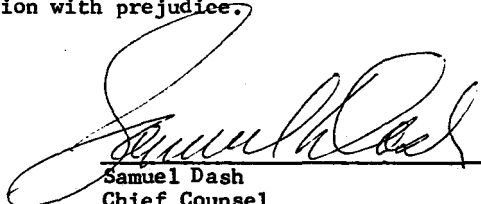
JAMES F. DAVEY  
CLERK

Civil Action  
No. 1593-73

NOTICE OF APPEAL

Notice is hereby given that the above named plaintiffs hereby appeal to the United States Court of Appeals for the District of Columbia from this Court's Order of October 17, 1973, that denied plaintiffs' Motion for Summary Judgment and dismissed this action with prejudice.

October 19, 1973

  
Samuel Dash  
Chief Counsel  
Senate Select Committee on  
Presidential Campaign Activities  
United States Senate  
Washington, D.C. 20510  
(202) 225-0531

**RECEIVED****OCT 23 1973****CLERK OF THE UNITED  
STATES COURT OF APPEALS****THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT**

SENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES, suing in its own  
name and in the name of the UNITED  
STATES,

and

SAM J. ERVIN, JR., HOWARD H. BAKER, JR.,  
HERMAN E. TALMADGE, DANIEL K. INOUE,  
JOSEPH M. MONTOYA, EDWARD J. GURNEY,  
and LOWELL P. WEICKER, JR., as United  
States Senators who are members of  
the Senate Select Committee on  
Presidential Campaign Activities

Appellants

v.

RICHARD M. NIXON, individually and as  
President of the United States

Appellee

No. ~~1593-73~~

73-2086

**MOTION FOR EXPEDITED BRIEFING AND ARGUMENT SCHEDULE AND  
SUGGESTION FOR HEARING EN BANC**

Appellants hereby move this Court to set an expedited  
briefing and argument schedule as follows:

(1) The parties, on Monday, October 29, 1973, shall  
file in this Court the briefs filed in this case in the  
District Court plus any supplemental briefs they desire

-2-

that take into account the ruling of the District Court in this cause and this Court's opinion of October 12, 1973, in Nos. 73-1962, 73-1967, and 73-1989 (the Special Prosecutor cases).

(2) Argument shall be held on all issues in the present litigation on Friday, November 2, 1973. Appellants also respectfully suggest that the hearing in this matter be en banc. Our position in these regards is explained below.

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The basic facts in this case (with an important exception noted below) are well-known and thus need be presented only in outline form. On July 16, 1973, Alexander P. Butterfield, a former Deputy Assistant to the President, testified before the Select Committee that certain Presidential conversations had been recorded by electronic means. On July 23, after its informal efforts to secure the tape recordings of certain Presidential conversations and other materials relevant to its investigations had failed, the Select Committee served subpoenas upon appellee President that called for recordings of five conversations between him and John Wesley Dean III, and that also sought certain other materials relating to

-3-

alleged criminal activities connected with the 1972 presidential campaign and election. Upon the failure of the President to honor these subpoenas, the appellants, on August 9, instituted this suit and, subsequently, on August 29, filed a motion for summary judgment. This motion was denied by the District Court on October 17 and the case dismissed for lack of jurisdiction. On October 19, appellants filed their notice of appeal and docketed the record below in this Court.\*/

\*/ While this is not the place to argue the jurisdictional issues in depth, we do note that Judge Sirica's extraordinary ruling that a Senate Committee and its members have no right to come into the Courts of the United States on these matters of great national importance simply will not withstand analysis. For example, the District Court's ruling (slip opinion pp. 16, 17) that constitutional rights (here the rights of senators to investigate and legislate) cannot be valued for jurisdictional amount purposes is clearly contrary to prevailing law. E.g., *Giles v. Harris*, 189 U.S. 475, 485 (1902) (Holmes, J.); *Spock v. David*, 469 F.2d 1047, 1052 (3rd Cir. 1972); *Williams v. Phillips*, \_\_\_\_\_ F. Supp. \_\_\_\_\_ (D.D.C. 1973, No. 490-73); *Fifth Ave. Peace Parade Committee v. Hoover*, 327 F. Supp. 238, 241-42 (S.D.N.Y. 1971); *West End Neighborhood Corp. v. Stans*, 312 F. Supp. 1066, 1068 (D.D.C. 1971). To give another illustration, the holding (slip opinion pp. 11-13) that the Administrative Procedure Act, 5 U.S.C. §§ 701-706, does not provide an independent jurisdictional basis is contrary to this Court's opinion in *Independent Broker-Dealers Trade Association v. SEC*, 142 U.S. App. D. C. 383, 442 F.2d 132, cert denied 404 U.S. 828 (1972); see also *Rettinger v. FTC*, 392 F.2d 454 (2d Cir. 1968); *Citizens Committee for Hudson Valley v. Volpe*, 425 F.2d 97 (2d Cir.) cert denied 400 U.S. 949 (1970); *Abbot Laboratories v. Gardner*, 387 U.S. 136 (1967); *Rusk v. Cort*, 369 U.S. 367 (1962).

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There has been some confusion in the press as to the results of a meeting of October 19 among the President, two of his counsel, and Senators Ervin and Baker of the Select Committee. It has been suggested in the press that a "compromise" of this lawsuit was reached whereby appellants would forego this litigation in exchange for "summaries" of certain tapes. This is not correct. While the President has unilaterally offered the Committee "summaries" of certain tape recordings, there was no tentative commitment by Senators Ervin and Baker that, as a quid pro quo, this lawsuit would be withdrawn. To the contrary, it was understood that the Committee could pursue its lawsuit.<sup>\*/</sup> Senator Ervin, the Committee's Chairman, has instructed counsel to file this motion for expedition and otherwise to proceed with this appeal.

We need hardly stress that this case is of great moment to the nation. The President is withholding materials that appellants urgently and vitally need to fulfill their legitimate legislative functions. The public interest in production of the subpoenaed materials to the Committee is now significantly escalated after the dramatic events of this past weekend that saw the Special Prosecutor and the Deputy Attorney General fired and the Attorney General

<sup>\*/</sup> There is, moreover, apparently a dispute as to the character of the documentation offered by the President.

-5-

resign.\*/

From the beginnings of this suit we have sought prompt resolution of this controversy and urged expedition in its handling -- a request that has in part been honored by appellee and the Court below.\*\*/ The necessity for expedition becomes more apparent as each day passes. The Committee, pursuant to its establishing resolution,\*\*\*/ must complete its task by February 28, 1974. Thus the Committee must not only finish its hearings by February 28 but also, by that date, must submit its final report, including its legislative recommendations for safeguarding the processes by which this nation elects its President. Because of these time pressures, we anticipate that the Committee's hearings will be concluded in a few weeks. If the materials subpoenaed are to be fully considered by the Committee, they must be promptly made available. Moreover, the unfortunate firing of the Special Prosecutor has served to deepen the crisis of confidence in this

\*/ It remains to be seen whether these events have frustrated this Court's ruling in the Special Prosecutor's cases, but no executive dismissals could rob a ruling in favor of the Committee of its effectiveness for the Congress is an equal branch of government not controlled by executive fiat.

\*\*/ For example, we moved the District Court to shorten the time for answer from 60 to 20 days, a result the appellee subsequently agreed to by stipulation.

\*\*\*/ Senate Resolution 60, 93rd Congress, 1st session (1973).

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country, thus making all the more urgent a ruling in this case that would assist in exposing all aspects of the Watergate affair to public view.

It is these considerations that have led us to request the expedited schedule set forth above. Because all issues in this case were fully briefed in the District Court, we suggest, in the interest of time, that the briefs below be filed in this Court on next Monday together with any supplemental briefs the parties may desire to submit discussing Judge Sirica's ruling or this Court's decision in the Special Prosecutor's cases. We also request that the Court, at this juncture, hear and determine all issues, jurisdictional and otherwise, in this case.\*/ If this course is not followed, it may be impossible finally to resolve this case before the Committee's mandate expires in February.

We respectfully submit that the suggested course imposes no undue hardship on the parties or the Court. There are no factual issues in this case, the appellee having failed to dispute any of the assertions set forth

\*/ Our appeal from the District Court's dismissal of this action with prejudice brings all issues in the litigation before this Court. It is not unusual for an Appellate Court, where considerations of judicial economy or other public interest demand, to decide other issues than those directly ruled on by a lower court. E.g. NRDC v. Morton 148 U.S. App.D.C. 5, 10-11, 458 F.2d 827, 832-33 (1972).



-7-

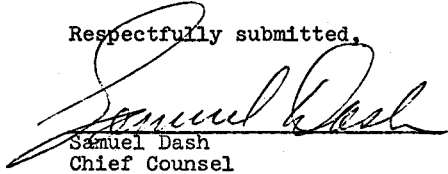
In our Statement Of Material Facts As To Which There Is No Genuine Issue. The issues are thus ones of law that have been extensively briefed in the Court below, many of which were not reached by Judge Sirica and do not need to be briefed again. Moreover, because of the Special Prosecutor's cases, this Court is quite familiar with certain of the important issues in our cause and, in fact, has already resolved a number of them. We are prepared to file a supplemental brief regarding Judge Sirica's opinion and this Court's ruling in the Special Prosecutor's cases on next Monday and are confident that the President's counsel, who have shown capacity for expedition in the past, can do likewise.\*/ We submit that the public's need to get the Watergate matter behind it once and for all -- a need the President himself has emphasized -- fully justifies whatever burden this expedited briefing and argument schedule may present.

\*/ This Court required expedition in the Special Prosecutor's cases and appellee's counsel were able to meet the schedule established.

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Finally, we suggest that this matter, as were the Special Prosecutor's cases, be heard en banc. It is only appropriate that a matter of such momentous import to the executive, the Congress, and the nation be considered by the entire bench.

Respectfully submitted,



Samuel Dash  
Chief Counsel

Fred D. Thompson  
Minority Counsel

Rufus Edmisten  
Deputy Counsel

James Hamilton  
Assistant Chief Counsel

Richard B. Stewart  
Special Counsel

Ronald D. Rotunda  
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Donald S. Burris  
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William T. Mayton  
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Sherman Cohn  
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Washington, D. C.  
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Arthur S. Miller  
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Washington, D. C. 20510  
Telephone Number 225-0531

Attorneys for Appellants

THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT

SENATE SELECT COMMITTEE ON PRESIDENTIAL	)	
CAMPAIGN ACTIVITIES, suing in its own	)	
name and in the name of the UNITED STATES,	)	
	)	
	)	
and	)	
	)	
	)	
SAM J. ERVIN, JR., HOWARD H. BAKER, JR.,	)	
HERMAN E. TALMADGE, DANIEL K. INOUE,	)	
JOSEPH M. MONTOYA, EDWARD J. GURNEY,	)	
and LOWELL P. WEICKER, JR., as United	)	No. 1593-73
States Senators who are members of	)	
the Senate Select Committee on	)	
Presidential Campaign Activities.	)	
	)	
Appellants,	)	
	)	
v.	)	
	)	
RICHARD M. NIXON, individually and as	)	
President of the United States,	)	
	)	
Appellee.	)	

MEMORANDUM IN RESPONSE TO MOTION FOR  
EXPEDITED BRIEFING AND ARGUMENT SCHEDULE

This memorandum is submitted in behalf of Appellee, President  
Richard M. Nixon, in response to Appellants' Motion for Expedited  
Briefing and Argument Schedule and Suggestion for Hearing En Banc.

Appellee concurs in the request by Appellants that the briefing and argument schedule be expedited. It is, however, our view that the schedule proposed by Appellants would, in requiring simultaneous briefs on October 29, 1973, deprive this Court of the full exposition of the issues that a case of this importance deserves. We believe that, as shown by recent experience in the related case brought by the Special Prosecutor, the filing of simultaneous briefs, on an overly accelerated schedule, prevents the narrowing and definition of issues prior to oral argument that is desirable in a case of this importance.

Accordingly, we would propose an expedited schedule as follows:

Appellants' brief to be filed on October 29, 1973;

Appellee's brief to be filed November 5, 1973;

Appellants' reply brief, if desired, on November 7, 1973;

Oral argument November 9, 1973.

It is our intention in this case, as in the case brought by the Special Prosecutor, to file not merely a supplemental brief, but a self-contained brief to relieve the Court of the burden of having to refer to the briefs below.

We are mindful of the desire of the Senate Select Committee for expedition and indeed have previously sought to accommodate its

desire where, and to the extent, possible. Indeed it is equally the wish of the President that the issues presented by this case be resolved as quickly as possible. However, the desire by both parties for expedition should not prevent the adoption of an orderly briefing schedule that will enable counsel for both parties to be of the greatest possible assistance to the Court.

In this connection, we would point out that while there is some similarity in the material sought to be produced, the legal issues presented by this case are, as reflected by the decision below, quite different from those presented in the case brought by the Special Prosecutor. In addition to the matter of jurisdiction on which the District Court reached its decision, the present case raises issues of justiciability and the authority of the Senate Select Committee and the propriety of its inquiry, as well as distinct questions of separation of powers that would require the most careful consideration by this Court if it should go beyond the grounds relied upon by the District Court in dismissing the action.

For the foregoing reasons, we suggest a briefing and argument schedule as outlined above, and also concur in the suggestion of the Senate Select Committee that this case be heard en banc.

Respectfully submitted,

CHARLES ALAN WRIGHT  
J. FRED BUZHARDT  
LEONARD GARMENT  
DOUGLAS M. PARKER  
ROBERT T. ANDREWS  
THOMAS P. MARINIS, JR.

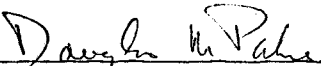
The White House  
Washington, D. C. 20500  
Telephone Number: 456-1414

October 24, 1973

Attorneys for the President

CERTIFICATE OF SERVICE

I, Douglas M. Parker certify that a copy of this memorandum was served upon Chief Counsel for Appellants, Samuel Dash, Esq., by delivery of a copy to the offices of the Senate Select Committee on Presidential Campaign Activities, on October 24, 1973.

  
\_\_\_\_\_  
Douglas M. Parker

THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT

**RECEIVED**

OCT 26 1973

CLERK OF THE UNITED  
STATES COURT OF APPEALS

SENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES, suing in its  
own name and in the name of the  
UNITED STATES,

and

SAM J. ERVIN, JR., HOWARD H. BAKER, JR.,  
HERMAN E. TALMADGE, DANIEL K. INOUE,  
JOSEPH M. MONTOYA, EDWARD J. GURNEY,  
and LOWELL P. WEICKER, JR., as United  
States Senators who are members of the  
Senate Select Committee on Presidential  
Campaign Activities

No. 73-2086

Appellants

v.

RICHARD M. NIXON, individually and as  
President of the United States

Appellee

WITHDRAWAL OF MOTION TO EXPEDITE

Appellants hereby withdraw their previously filed motion to expedite these proceedings and indicate their willingness to be governed by the normal time schedules provided for by the Federal Rules of Appellate Procedure and the General Rules of this Court.

Since the motion to expedite was filed, several significant events have occurred. Continued strong public concern over the dismissal of the Special Prosecutor has been expressed and the

-2-

President has now stated he will comply with Court orders relating to the tapes and records subpoenaed by the Special Prosecutor. The President, however, still refuses to comply with the Select Committee's subpoenas and has withdrawn his offer to make available to the Committee, through Senator Stennis, certain information contained on the tapes the Committee has subpoenaed.

Legislative activity has also considerably increased. The Senate Judiciary Committee will hold hearings next week to examine the dismissal of the Special Prosecutor and consider the need for legislation reestablishing that office. Numerous Congressional leaders of varying political persuasions have voiced support for a new Special Prosecutor and legislation to that end will be introduced.

Because of the renewed public and legislative interest in the Watergate affair and because there is now no independent Special Prosecutor to conduct the extensive investigations required, it is all the more important that appellants carry out the investigative mandate imposed on them by a unanimous Senate and not be diverted by technical or jurisdictional objections from securing the tapes and records they seek. The appellants remain confident that the jurisdictional bases they have asserted afford fully sufficient grounds



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to allow the Federal Courts to hear this suit. However, the Select Committee's Chairman, in order to remove any doubt on this issue and to resolve it as expeditiously as possible, has decided to introduce legislation in the Congress on Monday, October 29, that will provide that a Federal District Court has original jurisdiction to entertain suit by a duly authorized Congressional Committee to achieve compliance with subpoenas issued in the furtherance of its legislative functions. We anticipate, in view of the manifest public concern over the Watergate affair, that Senator Ervin's bill will quickly become law and thus the jurisdictional issue resolved more promptly than if the matter were left solely to litigation.

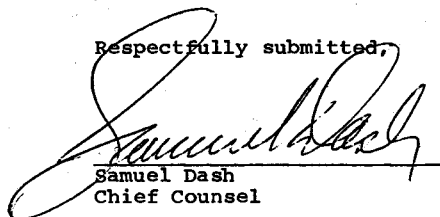
Because this legislative remedy will be sought, it seems appropriate that no immediate action be taken on the present appeal. The Court should not be required to spend time and effort on jurisdictional issues when the jurisdictional controversy may be promptly resolved by legislation.

We expect that Senator Ervin's legislative effort will be concluded by the end of the time period prescribed by the applicable rules for filing the appellants' brief. When this effort is concluded, we will submit to the Court our view as to what action it should take. If the matter is not resolved

-4-

within the time period referred to above, we will also make an appropriate submission to the Court in accordance with the Court's rules.

Respectfully submitted,



Samuel Dash  
Chief Counsel

Fred Thompson  
Minority Counsel

Rufus Edmisten  
Deputy Counsel

James Hamilton  
Assistant Chief Counsel

Richard B. Stewart  
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THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals  
for the District of Columbia Circuit

FILED NOV 19 1973

HUGH E. KLINE  
CLERK.

No. 73-2086

SENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES, suing in its  
own name and in the name of the  
UNITED STATES,

and

SAM J. ERVIN, JR., HOWARD H. BAKER, JR.,  
HERMAN E. TALMADGE, DANIEL K. INOUE,  
JOSEPH M. MONTOYA, EDWARD J. GURNEY,  
and LOWELL P. WEICKER, JR., as United  
States Senators who are members of the  
Senate Select Committee on Presidential  
Campaign Activities

Appellants

v.

RICHARD M. NIXON, individually and as  
President of the United States

Appellee

MOTION FOR EXTENSION OF TIME TO FILE BRIEF OF APPELLANTS

Appellants hereby move this Court to extend the time in  
which they may file their Brief of Appellants or other appropriate  
pleading until and including January 4, 1974. The grounds for  
this motion are set forth below.

Appellants' suit was dismissed by the District Court  
MOTION GRANTED

Hugh E. Kline, Clerk 11-28-73

*H. Kline*

- 2 -

(Sirica, J.) on October 17, 1973, for lack of jurisdiction. On October 19, appellants noted their appeal and docketed the record below in this Court. Appellants initially sought to expedite briefing and argument on this matter but, after legislation giving the District Court jurisdiction to hear the Select Committee's suit was introduced by Senator Ervin, appellants, recognizing that the Court should not be required to consider jurisdictional issues while legislation that would remove the controversy was pending, withdrew their expedition request. Moreover, it was appellants' view that legislation would prove the most expeditious course for resolving the jurisdictional issue.

The Senate, by voice vote, passed a jurisdictional bill on November 9, 1973.<sup>\*/</sup> The House, however, has not finally

<sup>\*/</sup> The Senate also, on November 7, passed Resolution No. 194, which establishes beyond doubt that the Committee was and is authorized by the Senate to subpoena and sue the President to obtain information needed for its investigation. The Resolution also recognizes that appellants, in subpoenaing and suing the President, were and are acting with valid legislative purposes and seeking information vital to the fulfillment of their legitimate legislative functions.

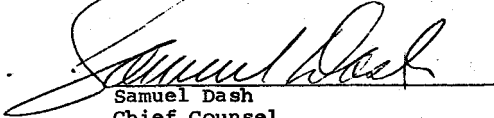
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acted on the bill. The proposed legislation is now before the House Judiciary Committee and, by present estimates, will not be reported out of that Committee until next week.

While we anticipate prompt House passage of this legislation, it is now apparent that the bill will not become law before November 28, the date the Brief of Appellants is due, and most likely will not receive final approval until mid-December. Consequently, appellants consider it appropriate to ask the Court for an extension of time until January 4, 1974, to file their brief or other appropriate pleading. Despite the fact that this extension of time is necessitated, we still believe that the legislative course we are pursuing will ultimately provide the most expeditious means to resolve the jurisdictional issue.

As soon as this legislative effort is completed, we will so advise the Court and submit our views as to what action the Court, in accordance with its rules, should then take.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Samuel Dash", is written over a horizontal line.

Samuel Dash  
Chief Counsel

Fred Thompson  
Minority Counsel

Rufus Edmisten  
Deputy Counsel

James Hamilton  
Assistant Chief Counsel

Richard B. Stewart  
Special Counsel

Ronald D. Rotunda  
Assistant Counsel

THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT

RECEIVED

DEC 18 1973

CLERK OF THE UNITED  
STATES COURT OF APPEALS

SENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES, suing in its own  
name and in the name of the UNITED STATES,

and

SAM J. ERVIN, JR., HOWARD H. BAKER, JR.,  
HERMAN E. TALMADGE, DANIEL K. INOUE, JOSEPH M.  
MONTTOYA, EDWARD J. GURNEY, and LOWELL P. WEICKER,  
JR., as United States Senators who are members  
of the Senate Select Committee on Presidential  
Campaign Activities,

No. 73-208

Appellants

v.

RICHARD M. NIXON, individually and as  
President of the United States,

Appellee

MOTION FOR EXPEDITED BRIEFING AND ARGUMENT SCHEDULE  
AND SUGGESTION FOR HEARING EN BANC

Appellants hereby move this Court to set an expedited  
briefing and argument schedule for this case as follows:

(1) The appellants, by January 4, 1974, shall file  
their Brief of Appellant on all issues in this case.

(2) The appellee President, by January 11, 1974,  
shall file his Brief of Appellee on all issues in this  
case.

-2-

(3) The appellants, if they so desire, shall file their Reply Brief by January 15, 1974.

(4) Argument shall be held on all issues in the present litigation on January 16, 1974.

Appellants also respectfully suggest that the hearing in this matter be en banc. Our positions in these regards are explained below.

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-3-

This case is presently on appeal from a ruling by the United States District Court for the District of Columbia (Sirica, J.) that, on October 17, dismissed this action for lack of jurisdiction. The present motion seeks establishment of an expedited briefing and argument schedule for all issues in this case.

The appellants previously asked this Court to hold this case in abeyance while a bill to give the District Court jurisdiction over the present suit was considered by Congress. It was appellants' view that a legislative solution would provide the most expeditious means for resolution of the jurisdictional controversy even though they remained convinced that the jurisdictional bases they urged below were fully sufficient. Congress has now passed a law giving the District Court jurisdiction over this case that is codified as 18 U.S.C. §1364.\*

We are aware that one possible response to this statute would be for the Court to remand this case to the District Court for consideration of its effect herein

\*/ This section became law after midnight, Tuesday morning, December 18, upon the President's failure to sign the bill within ten days after its transmittal to him. A copy of this statute is attached to this memorandum.



-4-

and determination of the other issues in this case. We submit, however, that this is not the appropriate course in the present situation. The Select Committee's mandate expires on February 28, 1974, at which time it will cease to exist. More immediately, the Committee will begin its final set of hearings around January 21. The Committee, therefore, has urgent need to have all the issues in this lawsuit promptly resolved in order that it can obtain the materials subpoenaed for use in its hearings. There is also the pressing necessity for public revelation of all Watergate facts, a result the Special Prosecutor will not immediately further because the materials he receives will presently go only to the grand jury, not to the general public.\*/

Our submission, therefore, is that the Court should decline to remand this matter to the lower court where a pro forma amendment of the complaint would be all that is

\*/ Relevant in this regard is the Supreme Court's observation in Watkins v. United States, 354 U.S. 178, 200 (1957):

"[There is a] power of the Congress to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government. That is the only kind of activity described by Woodrow Wilson in Congressional Government when he wrote: 'The informing function of Congress should be preferred even to its legislative function.' Id., at 303. From the earliest times in its history, the Congress has assisiously performed an 'informing function' of this nature."

-5-

necessary to resolve the jurisdictional issue\*/ and should instead proceed to the resolution of all issues in this case. To do so would be but an application of two well-settled principles of appellant practice: First, that an Appeals Court decides cases on the basis of the law as it exists when the case reaches the appellate level. E.g., United States v. Alabama, 362 U.S. 602 (1960), De Rodulfa v. United States, 149 U.S. App. D.C. 154, 164-65, 461 F.2d 1246, 1250-51 (1972), cert. denied 409 U.S. 949 (1972). Second, that an Appeals Court, where considerations of judicial economy or other public interest demand, will decide other issues than those directly ruled on by a lower court.\*\*/ E.g., NRDC v. Morton, 148 U.S. App. D.C. 5, 10-11, 458 F.2d 827, 832-33 (1972).

\*/ Rule 15, F.R.Civ.P., provides that, even after a complaint is answered, "leave [to amend it] shall be freely given when justice so requires." The Courts have demonstrated considerably liberality in allowing amendment under this section and several decisions have allowed amendment after dismissal for a jurisdictional defect to correct the jurisdictional shortcoming. E.g., Christensson v. Hogdal, 91 U.S. App. D.C. 251, 199 F.2d 402 (1952); Eklund v. Mora, 410 F.2d 731 (5th Cir. 1969).

\*\*/ The issues in this case are solely ones of law. Appellee does not dispute any assertion set forth in appellants' Statement of Material Facts As To Which There Is No Genuine Issue.

-6-

Recent events have also greatly simplified the resolution of certain nonjurisdictional issues in this case. The new statute, in addition to establishing jurisdiction, also provides that the Committee has standing to sue in its own name and in the name of the United States to enforce its subpoenas and may prosecute its action by attorneys of its designation, thus vitiating appellee's claims below that appellants lack standing to bring this action and that suits brought in the name of the United States must be prosecuted by the Attorney General or his subordinates.

Moreover, on November 7, 1973, the Senate enacted Senate Resolution 194, 93d Cong., 1st Sess. (Nov. 7, 1973) (attached hereto), which effectively answers several other contentions raised by appellee in the District Court. S. Res. 194 establishes beyond doubt that the Committee was and is authorized by the Senate to subpoena and sue the President to obtain information needed for its investigation. The Resolution also affirms that the Committee, in subpoenaing and suing the President, was and is acting with valid legislative purposes and seeking information vital to the fulfillment of its legitimate legislative functions. Appellee's claims that the Senate had not empowered the Committee to subpoena and sue the President

-7-

and that the Committee's hearings constitute a criminal trial that usurps the functions of the judiciary, while always quite dubious,\*/ are now stripped of any semblance of validity.

The remaining issues for decision are those going to the merits of this litigation and to justiciability. But these issues were in large part dealt with by this Court in the Special Prosecutor's cases, Nos. 73-1962, 73-1967, and 73-1989. \*\*/ It will thus not be, we submit, an undue hardship on this Court to resolve these issues without benefit of further District Court exposition.

Before the decision to introduce a jurisdictional bill was reached, appellants asked this Court for an expedited briefing and argument schedule for this appeal. Appellee agreed at that time that an expedited schedule was needed in order that this important case be promptly

\*/ It has long been established, for example, that it is entirely proper for a Congressional committee to investigate criminality in the executive branch. E.g., McGrain v. Daugherty, 273 U.S. 135 (1927); Sinclair v. United States, 279 U.S. 263 (1929).

\*\*/ Note further that 18 U.S.C. § 1364 provides that the "District Court shall have jurisdiction to enter any such judgment or decree" in a civil action brought against the President under this section "to enforce obedience to any subpoena or order" issued by the Senate Select Committee. This provision in particular, and the statute generally, constitute a determination by Congress, not vetoed by the President, that this case is fully justiciable.

-8-

resolved.\*/ Also, appellee did not then contest our request that all issues in this case be considered on the present appeal by this Court.

We are confident, in view of appellee's public statements regarding his desire to disclose all relevant Watergate facts, that appellee will still agree that this matter be handled on an expedited basis and not object to our suggestion that all issues be decided at this time. Certainly, with the passage of 18 U.S.C. § 1364 and S. Res. 194, the issues in this case have been greatly simplified, thus making full judicial disposition at this stage even more practical.

If, however, the Court does not agree with the procedures we here urge, we would request that it promptly remand this case to the District Court so that Court may quickly decide all issues in this case.

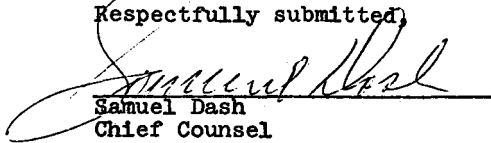
Appellee also previously agreed to our former suggestion that hearing on this matter be en banc. We renew this suggestion, being of the continuing view that

\*/ Appellants were also able to meet the expedited briefing and argument schedule in the Special Prosecutor's cases that this Court there deemed necessary. As noted, similar considerations of urgency pervade the present matter.

-9-

a case of this importance to the Executive, the Congress,  
and the Nation should be decided by the full bench.

Respectfully submitted,

  
Samuel Dash  
Chief Counsel

Fred Thompson  
Minority Counsel

Rufus Edmisten  
Deputy Counsel

James Hamilton  
Assistant Chief Counsel

Richard B. Stewart  
Special Counsel

Ronald D. Rotunda  
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Attorneys for Appellants

## PUBLIC LAW 93-190

## Ninety-third Congress of the United States of America

AT THE FIRST SESSION

*Begun and held at the City of Washington on Wednesday, the third day of January,  
one thousand nine hundred and seventy-three*

## An Act

To confer jurisdiction upon the district court of the United States of certain civil actions brought by the Senate Select Committee on Presidential Campaign Activities, and for other purposes.

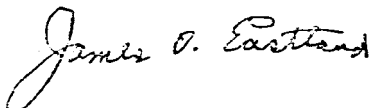
*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That (a) the District Court of the United States for the District of Columbia shall have original jurisdiction, without regard to the sum or value of the matter in controversy, of any civil action heretofore or hereafter brought by the Senate Select Committee on Presidential Campaign Activities, which was created on February 7, 1973, by Senate Resolution Numbered 60, to enforce or secure a declaration concerning the validity of any subpoena or order heretofore or hereafter issued by said Committee to the President or the Vice President or any other officer of the United States or any officer or employee of any department or agency of the United States to procure the production before the said Committee of any information, documents, taped recordings, or other materials relevant to matters the said Committee is authorized to investigate, and the said District Court shall have jurisdiction to enter any such judgment or decree in any such civil action as may be necessary or appropriate to enforce obedience to any such subpoena or order.

(b) The Senate Select Committee on Presidential Campaign Activities shall have authority to prosecute in its own name or in the name of the United States in the District Court of the United States for the District of Columbia any civil action heretofore or hereafter brought by said Committee to enforce or secure a declaration concerning the validity of any subpoena or order heretofore or hereafter issued by said Committee to the President or Vice President or any other officer of the United States or any officer or employee of any department of the United States to procure the production before the said Committee of any information, documents, taped recordings, or other materials relevant to the matters the Committee is authorized to investigate, and pray the said District Court to enter such judgment or decree in said civil action as may be necessary or appropriate to enforce any such subpoena or order.

(c) The Senate Select Committee on Presidential Campaign Activities may be represented by such attorneys as it may designate in any action prosecuted by said Committee under this Act.



*Speaker of the House of Representatives.*



*Vice President of the United States and  
President of the Senate, pro Tempore*



93<sup>d</sup> CONGRESS  
1<sup>ST</sup> SESSION

# S. RES. 194

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## IN THE SENATE OF THE UNITED STATES

NOVEMBER 2, 1973

Mr. ERVIN (for himself, Mr. BAKER, Mr. GURNEY, Mr. INOUE, Mr. MONTOYA, Mr. TALMADGE, and Mr. WEICKER) submitted the following resolution; which was ordered to be placed on the calendar

NOVEMBER 7, 1973

Considered and agreed to

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## RESOLUTION

Relating to S. Res. 60.

1      *Resolved, That—*

2      SECTION 1. By S. Res. 60, Ninety-third Congress, first  
3 session (1973), section 3 (a) (5), the Select Committee on  
4 Presidential Campaign Activities was and is empowered to  
5 issue subpoenas for documents, tapes, and other material to  
6 any officer of the executive branch of the United States Gov-  
7 ernment. In view of the fact that the President of the United  
8 States is, as recognized by S. Res. 60, an officer of the  
9 United States, and was a candidate for the office of President  
10 in 1972 and is therefore a person whose activities the select  
11 committee is authorized by S. Res. 60 to investigate, it is



1 the sense of the Senate that the select committee's issuance  
2 on July 23, 1973, of two subpoenas duces tecum to the Pres-  
3 ident for the production of tapes and other materials was  
4 and is fully authorized by S. Res. 60. Moreover, the Senate  
5 hereby approves and ratifies the committee's issuance of  
6 these subpoenas.

7 SEC. 2. On August 9, 1973, the select committee and its  
8 members instituted suit against the President of the United  
9 States in the United States District Court for the District of  
10 Columbia to achieve compliance with the two subpoenas ref-  
11 erenced in section 1 above, and since that time, in both the  
12 district court and the United States Court of Appeals for the  
13 District of Columbia Circuit, have actively pursued this litiga-  
14 tion. It is the sense of the Senate that the initiation and pur-  
15 suit of this litigation by the select committee and its members  
16 was and is fully authorized by applicable custom and law,  
17 including the provisions of S. Res. 262, Seventieth Congress,  
18 first session (1928). In view of the entirely discretionary  
19 provisions of section 3 (a) (6) of S. Res. 60, it is further  
20 the sense of the Senate that the initiation of this lawsuit did  
21 not require the prior approval of the Senate. Moreover, the  
22 Senate hereby approves and ratifies the actions of the select  
23 committee in instituting and pursuing the aforesaid litigation.

24 SEC. 3. The select committee and its members, by issuing  
25 subpoenas to the President and instituting and pursuing litiga-

1   tion to achieve compliance with those subpoenas, were and  
2   are acting to determine the extent of possible illegal, im-  
3   proper, or unethical conduct in connection with the Pres-  
4   idential campaign and election of 1972 by officers or  
5   employees of the executive branch of the United States Gov-  
6   ernment or other persons. It is the sense of the Senate that,  
7   in so doing, the select committee and its members were and  
8   are engaged in the furtherance of valid legislative purposes,  
9   to wit, a determination of the need for and scope of corrective  
10   legislation to safeguard the processes by which the President  
11   of the United States is elected and, in that connection, the  
12   informing of the public of the extent of illegal, improper, or  
13   unethical activities that occurred in connection with the  
14   Presidential campaign and election of 1972 and the involve-  
15   ment of officers or employees of the executive branch or  
16   others therein. It is further the sense of the Senate that the  
17   materials sought by the committee's subpoenas are of vital  
18   importance in determining the extent of such involvement  
19   and in determining the need for and scope of corrective  
20   legislation.

93D CONGRESS  
1ST SESSION

## S. RES. 194

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### RESOLUTION

Relating to S. Res. 60.

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By Mr. ERVIN, Mr. BAKER, Mr. GURNEX, Mr.  
INOUE, Mr. MONTOYA, Mr. TALMADGE, and  
Mr. WEICKER

---

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NOVEMBER 2, 1973

Ordered to be placed on the calendar

NOVEMBER 7, 1973

Considered and agreed to

THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT

SENATE SELECT COMMITTEE ON  
PRESIDENTIAL CAMPAIGN ACTIVITIES,  
suing in its own name and in the name of  
the UNITED STATES,

and

SAM J. ERVIN, JR., HOWARD H. BAKER, JR.,  
HERMAN E. TALMADGE, DANIEL K. INOUE,  
JOSEPH M. MONTOYA, EDWARD J. GURNEY,  
and LOWELL P. WEICKER, JR., as United States  
Senators who are members of the Senate Select  
Committee on Presidential Campaign Activities,

No. 73-2086

Appellants

v.

RICHARD M. NIXON, individually and as  
President of the United States,

Appellee

RESPONSE OF APPELLEE TO MOTION FOR EXPEDITED  
BRIEFING AND ARGUMENT SCHEDULE

On October 17, 1973, the District Court dismissed the  
present action for want of jurisdiction. On October 19th the  
plaintiffs filed a notice of appeal.

The events that followed this simple beginning are of im-  
portance in assessing the present motion of appellants. On  
October 23rd appellants moved for an expedited briefing and  
argument schedule. On October 24th we filed our response, in  
which we did not object to expedited treatment of the case,

but proposed a schedule we considered more satisfactory than that suggested by appellants. On October 25th appellants filed with this Court a document withdrawing their request of two days before for an expedited appeal, and specifically represented to this Court that by that action they wished to "indicate their willingness to be governed by the normal time schedule provided for by the Federal Rules of Appellate Procedure and the general rules of this Court."

But on December 19th, having taken advantage of the normal time schedule for appeals so that they might accomplish legislative legerdemain that they hope will change the rules of the game, they come once again to this Court with a new motion for expedited briefing and argument schedule.

The appellants have taken full advantage of the normal time schedule for appeals. Their appeal was docketed with this Court on November 26th, two days before the latest day permitted by FRAP 11(a). They propose that their brief be filed by January 4th, the last business day before it would be due in any event under FRAP 31(a).<sup>1</sup>

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1. Ordinarily the last day for filing of their brief would be January 5th, but since that is a Saturday they would, under FRAP 27(a), be permitted to file on Monday, January 7th.

Thus the situation is that the appellants have in substance used for their own purposes all of the time the rules make available to litigants on appeal, but, despite their formal representation to this Court of their "willingness to be governed by the normal time schedule," they now propose that appellees be allowed seven days, rather than the 30 days provided by FRAP 31(a), for the preparation and filing of our brief and they presume to tell this Court when it should hear their appeal. This is a strange way for a litigant to deal with a court.

In October, when appellants considered this a matter of great urgency, we indicated our willingness to cooperate with them and to proceed under a schedule that would have required us to prepare our brief in a time frame that would have imposed great burdens upon us. But the sense of urgency the appellants felt on October 23rd had apparently vanished by October 25th. They were perfectly prepared to tolerate two months of delay to serve their own purposes. Now that they have done this, they once again regard the case as urgent and ask appellee and this Court to inconvenience themselves to accommodate the appellants.

For appellee it would be more than merely an inconvenience. We anticipate that a Brief of Appellee "on all issues in this case," as called for by appellants' motion, would be a very lengthy document. It would be difficult under any circumstances to prepare such a brief in the seven days that appellants propose we be allowed. Circumstances have changed significantly since October, when we were willing -- though even then it would be difficult -- to prepare a major brief in a case of great importance in so short a time. The principal responsibility for this brief, as with all briefs filed on behalf of the President in this case and the related case brought by the Special Prosecutor, will be on Messrs. Wright and Marinis. In October Mr. Marinis was working in Washington full time. He has since returned to his law firm in Houston, and though he remains available as a consultant to assist on the brief, it will require more time to write the brief without his fulltime service. In addition, Mr. Wright is committed to attending a meeting of a subcommittee of the Committee on Court Administration of the Judicial Conference of the United States on January 7th and 8th, and thus would not be able to work on the brief on two of the seven days that appellants propose appellee be allowed.

This chain of events and these circumstances should in

themselves be enough to cause this Court to deny the December 19th motion and to allow appellee "to be governed by the normal time schedule," as appellants have been. But there is more.

To hear this appeal at all, much less on a time schedule that allows the normal time to one party but less than one-quarter the normal time to the other, would make a travesty of efficient judicial administration. It would require the parties to brief and argue all of the issues in the case, and it would require this Court patiently to consider and hear those arguments, when it is likely that many of those issues need never be decided.

The present appeal would bring to this Court all of the issues that were argued before Judge Sirica. These issues -- some going to jurisdiction and others to the merits -- are very numerous. But this appeal would also now include a new and very difficult issue. At the outset both parties and the Court would have to consider what effect, if any, the Act of December 18th has on a case that was dismissed for want of jurisdiction by the District Court long before the statute was enacted. Can a Court of Appeals reverse a District Court if the District Court correctly determined that it lacked jurisdiction and subsequently, while the case is in the Court of Appeals, a statute is enacted that purports to grant to the District Court jurisdiction of such



a case? That is in itself a very complex question, on which the precedents are scanty. There is a body of law, dating back to the case of United States v. Schooner Peggy, 1 Cranch (5 U.S.) 103 (1801), on the effect of a change in the substantive law while a case is still pendente lite. There is also a good deal of law, of which Ex Parte McCardle, 7 Wall. (74 U.S.) 506 (1858), is the best known example, on the effect of a repeal of jurisdiction while a case is on appeal. See de Rodulfa v. United States, 149 U.S. App. D.C. 154, 461 F. 2d 1240, 1251 n. 56 (D.C. Cir. 1972). But this Court would have to write on an essentially clean slate in deciding whether Congress can confer jurisdiction retroactively.

It would be an interesting issue to argue -- but both sides would also have to argue all of the other issues without knowing how the Court would resolve this matter of a retroactive grant of jurisdiction. If the Court should decide that the Act of December 18th is applicable to the present suit, all of our argument on the jurisdictional issues that were decisive in the District Court would be a waste of breath. If the Court should rule that the new statute is not applicable to the present case, and if it should find that the District Court was right in holding that on October 17th there was no jurisdiction of such a case, any argument going to the merits would be superfluous. In addition, this Court's consideration of those difficult

jurisdictional questions would be good for this day and train only, since inevitably the Senate committee would commence a new action relying on the new statute.

Finally, if this Court should hold that there is jurisdiction of this case -- either because it considers the Act of December 18th to be applicable or because it finds that the District Court erred in holding in October that it had no jurisdiction of such a case -- this Court would have to sit as a court of first instance on the merits of the case. Because Judge Sirica held that he had no jurisdiction, he quite properly did not reach the merits of the case. Thus, wholly aside from the obvious differences that may apply to a demand on the President by a Senate committee and a demand on the President by a grand jury, there has been no adjudication of whether "the uniquely powerful showing" of need that influenced a majority of this Court in Nixon v. Sirica, No. 73-1962 (D.C. Cir., Oct. 12, 1973), has been made in the present case. That is the kind of issue that should be determined in the first instance by the District Court, subject to review in this appellate tribunal, rather than having this Court act as a court of original jurisdiction.

Appellants obviously have doubts -- well-justified as we have endeavored to show -- whether this Court will wish to act on the present case in the posture it has now assumed. They propose as an alternative that this Court "promptly

remand this case to the District Court so that Court may quickly decide all issues in this case." Clearly such a procedure would be preferable to hearing the present appeal on all issues, though appellants do not cite -- and we are not ourselves aware of -- any authority for a remand at the instance of an appellant so that he can amend his complaint and strengthen his case. The more orderly procedure, we submit, would be for appellants to dismiss the present appeal and to commence a new action in the District Court that would be addressed to those issues, and only those issues, that are presently relevant.

Respectfully submitted,

CHARLES ALAN WRIGHT  
2500 Red River St.  
Austin, Texas 78705

LEONARD GARMENT  
J. FRED BUZHARDT  
ROBERT T. ANDREWS  
The White House  
Washington, D.C. 20500

THOMAS P. MARINIS, JR.  
First City National Bank Bldg.  
Houston, Texas 77002

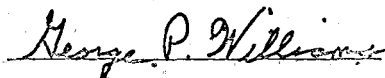
Attorneys for the President

Of Counsel

RICHARD A. HAUSER  
K. GREGORY HAYNES  
GEORGE P. WILLIAMS

## CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of December, 1973, a true copy of the foregoing Response of Appellee to Motion for Expedited Briefing and Argument Schedule was hand delivered to the offices of the Chief Counsel of the Senate Select Committee on Presidential Campaign Activities in the New Senate Office Building.

A handwritten signature in cursive script, reading "George P. Williams", is written over a horizontal line.

GEORGE P. WILLIAMS  
The White House  
Washington, D.C. 20500  
Attorney for Appellee

THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT

SENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES, suing in its own name  
and in the name of the UNITED STATES,

and

SAM J. ERVIN, JR., HOWARD H. BAKER, JR.,  
HERMAN E. TALMADGE, DANIEL K. INOUE,  
JOSEPH M. MONTOYA, EDWARD J. GURNEY, and  
LOWELL P. WEICKER, JR., as United States  
Senators who are members of the Senate Select  
Committee on Presidential Campaign Activities,

Appellants

v.

RICHARD M. NIXON, individually and as  
President of the United States,

Appellee

No. 73-2086

REPLY MEMORANDUM IN  
SUPPORT OF MOTION FOR  
EXPEDITED BRIEFING AND ARGUMENT SCHEDULE  
AND SUGGESTION FOR HEARING EN BANC

Appellants, from the beginning in both the District Court and  
this Court, have sought to have this case resolved in the most expedi-  
tious manner. Our request to hold the present appeal in abeyance  
pending passage of a jurisdictional statute was to further this end--it  
was our belief that the legislative route would, in the long run,

-2-

provide the quickest means for settlement of the jurisdictional issues in this controversy.\*/ The present request for expedition is thus wholly consistent with our previous actions in this case.

Appellee's opposition to this request would have the evident effect of delaying resolution of this case beyond February 28, 1974, the date the Select Committee, under S. Res. 60, ceases to exist. This fact is most apparent in appellee's suggestion that appellants should dismiss the present appeal and commence a new action in the District Court where appellee would have 60 days to answer a new complaint and other opportunities to postpone final judgment until the Committee's life expires. And, of course, the inevitable appeal that would follow a District Court decision would consume even more time.

As previously submitted, we believe the schedule we have urged would impose no undue hardship on the parties or the Court. Surely appellee, with the great resources at his command, can arrange for expeditious preparation of a brief on issues which his counsel are fully familiar with and have briefed several times. And, we respectfully submit, this Court will be able to handle all issues in this case on an expedited basis without undue difficulties.

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\*/ It is exceedingly difficult for the President to dismiss the new jurisdictional statute as "legislative legerdemain" since he failed to veto it and allowed it to become law.

-3-

The jurisdiction of the Federal Courts over this controversy has been established beyond any question through the enactment of Public Law 93-190, which is now codified as 18 U.S.C. § 1364. That statute, which applies to "any civil action heretofore . . . brought" by the Committee, was clearly intended to confer jurisdiction over this case. And there is no doubt as to Congress' constitutional power to accomplish that result. Congress has wide discretion in regulating the jurisdiction of the Federal Courts. See C. Wright, *Law of Federal Courts* § 10 (1970 ed.). Specifically, Congress may take away the jurisdiction of Federal Courts over pending cases. E.g., Ex Parte McCordle, 7 Wall (74 U.S.) 506 (1858); De Rodulfa v. United States, 149 U.S. App. D.C. 154, 461 F.2d 1246 (1972), and cases there discussed. A fortiori, Congress may extend federal jurisdiction to pending cases. The Supreme Court so held in United States v. Alabama, 362 U.S. 602 (1960), cited at page 5 of our Motion. There the Court ruled that the Civil Rights Act of 1960 operated to confer federal jurisdiction over a suit that had been dismissed by the District Court prior to passage of the Act, stating that "(u)nder familiar principles, the case must be decided on the basis of law now controlling . . . " 362 U.S. at 604. Appellee cites no contrary authority\*/ and we know of none. There is

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\*/ Indeed, all of the authorities cited by appellee (p. 6) sustain the power of Congress to enact legislation applicable to pending cases.

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accordingly no question as to the Federal Courts' jurisdiction over this controversy.

Moreover, the remaining threshold issues in this case--those relating to standing and the Committee's right to subpoena and sue the President and to investigate wrongdoing in the executive branch--have been greatly simplified by the passage of 18 U.S.C. § 1364 and S. Res. 194.

In these circumstances, and given the urgent need for prompt resolution of this controversy, this Court should now proceed to decide the major issues of justiciability and the merits. By virtue of its decision in Nixon v. Sirica, this court is already conversant with these issues. We have no doubt that the Court, on the basis of the undisputed facts in this case<sup>\*/</sup>, can conclude that, as in the Special Prosecutor's cases, there is a "uniquely powerful showing" of need that demands adjudication in appellants' favor.

It is thus our conclusion that the appropriate course is for the Court to deal with all issues in this case on an expedited basis. Appellee suggests no good reason why the time-consuming process of remand, District Court decision, and subsequent appeal should be

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<sup>\*/</sup> There are no factual issues in this case, appellee having failed to contest any of the assertions set forth in the District Court in appellants' State of Material Facts As To Which There Is No Genuine Issue.



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pursued, and there is none. Appellants' motion for an expedited briefing and argument schedule should be granted.\*/

Respectfully submitted,

*Ronald D. Rotunda*

Samuel Dash  
Chief Counsel

Fred Thompson  
Minority Counsel

Rufus Edmisten  
Deputy Counsel

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Assistant Chief Counsel

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Arthur S. Miller  
Chief Consultant to  
the Select Committee  
Of Counsel

---

\*/ Appellee has failed to deal with our request that this appeal be heard en banc and we thus assume that he, as previously, has no objection to this suggestion if the Court decides to retain and decide this case.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-2086

September Term, 1973

Civil Action 1593-73

Senate Select Committee on Presidential Campaign Activities, suing in its own name and in the name of the United States, **United States Court of Appeals**  
et al., for the District of Columbia Circuit

Appellants

v.

FILED DEC 28 1973

HUGH E. KLINE  
CLERK

Richard M. Nixon, Individually and as  
President of the United States,

Before: Bazelon, Chief Judge; Wright, McGowan, Leventhal, Robinson,  
MacKinnon and Wilkey, Circuit Judges

## O R D E R

On consideration of appellants' motion for expedited briefing and argument schedule and suggestion for hearing en banc and of the responsive pleadings filed with respect thereto, it is

ORDERED by the Court, en banc, that this case is remanded to the United States District Court for the District of Columbia for further proceedings in light of Pub. L. No. 93-190, to be codified as 18 U.S.C. § 1364.

The Clerk is directed to issue a certified copy of this order to the District Court forthwith.

Per Curiam

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON :  
PRESIDENTIAL CAMPAIGN :  
ACTIVITIES, SUING IN ITS OWN :  
NAME AND IN THE NAME OF THE :  
UNITED STATES, ET AL, :

Plaintiffs, :

vs :

RICHARD M. NIXON, INDIVIDUALLY :  
AND PRESIDENT OF THE UNITED :  
STATES, :

Defendant. :

CIVIL ACTION NO. 1593-73

FILED ✓

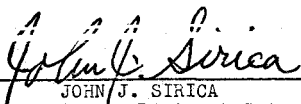
JAN 7 1974

JAMES F. DAVEY, Clerk

O R D E R

The above captioned case is reassigned from Chief Judge  
John J. Sirica to Judge Gerhard A. Gesell for all purposes.


January 7, 1974

  
\_\_\_\_\_  
JOHN J. SIRICA  
United States District Judge  
Chief Judge

A TRUE COPY

JAMES F. DAVEY, Clerk

By

  
\_\_\_\_\_  
Deputy Clerk

THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES, et al.,

Plaintiffs

v.

RICHARD M. NIXON, individually and as  
President of the United States,

Defendant

FILED

JAN 7 1974

JAMES F. DAVEY  
CLERK

Civil Action  
No. 1593-73

PLAINTIFFS' MEMORANDUM ON REMAND

The Court of Appeals has now remanded this case to this Court for consideration of the effect of Public Law 93-190 (to be codified as 18 U.S.C. § 1364), which gives this Court jurisdiction over the present controversy and also establishes plaintiffs' standing to sue in the Select Committee's own name and in the name of the United States.\*

In addition to the enactment of this statute, which became law on December 19, 1973, upon the President's failure to sign it within ten days of transmittal to him, there are several other significant events affecting this lawsuit that have occurred since this matter was last briefed before this Court. The Senate, on November 7, 1973, unanimously enacted Senate Resolution 194, 93rd Cong., 1st Sess., which speaks to the Select Committee's authority to subpoena and sue the President and to investigate wrongdoing in the executive branch. The Court of Appeals, on

\* The Court of Appeals order states that "this case is remanded to the United States District Court for further proceedings in light of Pub.L. No. 93-190, to be codified as 18 U.S.C. § 1364."

-2-

October 12, 1973, decided Nixon v. Sirica, Nos. 73-1962, 73-1967, 73-1989, a decision highly relevant to the questions of justiciability and the merits in this litigation. Also, the President, in compliance with Court order and voluntarily, has turned over to this Court and the Special Prosecutor certain of the tapes and documents sought by this suit, an action which significantly affects his claims of confidentiality regarding those materials.

The ramifications of these various events to the present proceeding are the subject of this memorandum.\*/

I. All Threshold Questions Must Be Resolved in Plaintiffs' Favor

The President has raised certain technical and jurisdictional objections to the maintenance of this suit. None of these objections, particularly in view of the recent actions by the full Congress and the Senate, will withstand analysis.

A. The District Court Has Jurisdiction Over This Lawsuit

Upon this Court's dismissal of this action for want of jurisdiction, Chairman Ervin introduced a bill in Congress to provide jurisdiction over this litigation in the belief that the legislative route would be the most expeditious course for resolution of that particular controversy.\*\*/ The Congress has now enacted, and the President failed to veto, P.L. 93-190, which provides unquestionable jurisdictional foundation for this action.

\*/This memorandum supports our Motion for Summary Judgment filed on August 29, 1973, which, after the Court of Appeals remand, is still pending.

\*\*/ Senator Ervin's action in this regard was consistent with this Court's observation in its October 17 opinion in this case (File Opinion 5-6, 18) that Congressional action could provide jurisdiction in this case.

Subsection (a) of this statute provides:

"The District Court of the United States for the District of Columbia shall have original jurisdiction, without regard to the sum or value of the matter in controversy, of any civil action heretofore or hereafter brought by the Senate Select Committee on Presidential Campaign Activities, which was created on February 7, 1973, by Senate Resolution Numbered 60, to enforce or secure a declaration concerning the validity of any subpoena or order heretofore or hereafter issued by said Committee to the President or the Vice President or any other officer of the United States or any officer or employee of any department or agency of the United States to procure the production before the said Committee of any information, documents, taped recordings, or other materials relevant to matters the said Committee is authorized to investigate, and the said District Court shall have jurisdiction to enter any such judgment or decree in any such civil action as may be necessary or appropriate to enforce obedience to any such subpoena or order."

This statute, which applies to "any civil action heretofore . . . brought" by the Committee, was clearly intended to confer jurisdiction in this case. There is no doubt as to Congress' constitutional power to accomplish that result for Congress has wide discretion in regulating the jurisdiction of the Federal Courts. See C. Wright, Law of Federal Courts § 10 (1970 ed.). Congress may take away the jurisdiction of Federal Courts over pending cases. E.g., *Ex Parte McCordle*, 7 Wall (7<sup>th</sup> U.S.) 506 (1868); *de Rodulfa v. United States*, 149 U.S. App. D.C. 154, 461 F.2d 1240 (1972), and cases there discussed; see also, *Crozier v. Krupp*, 224 U.S. 290 (1912). And, *a fortiori*, Congress may extend federal jurisdiction to pending cases. The Supreme Court so held in *United States v. Alabama*, 362 U.S. 602 (1960) (per curiam), where it ruled that the Civil Rights Act of 1960 operated to confer federal jurisdiction over a suit that had been dismissed by the District Court prior to passage of the Act, stating that "(u)nder familiar principles, the case must be decided on the basis of law now controlling. . . ." 362 U.S. at 604. See also,

-4-

In Re Monsen, 74 F.2d 411 (7th Cir. 1935). The basic doctrine that an appeal is governed by the law in existence at the time of the appeal has been established at least since the Supreme Court's decision in United States v. The Schooner Peggy, 1 Cranch (5 U.S.) 103 (1801) (Marshall, J.). See, e.g., Hamm v. Rockhill, 379 U.S. 306, 312-13 (1968); Carpenter v. Wabash Ry. Co., 309 U.S. 23, 26-27 (1940).

The original Complaint in this case has now been properly amended by leave of Court and without objection of defendant to include an allegation that jurisdiction rests on the new statute, and the Court has informed defendant that, pursuant to F.R.Civ.P. 15, he must answer within ten days.\*/ The Court allowance of amendment is, of course, perfectly consistent with the Court of Appeals' remand order that returned this case "for further proceedings in light of Pub.L. No. 93-190." There is thus no need for plaintiffs to file a new lawsuit where, we trust, the issue of retroactivity would not even be raised by defendant and this Court has both the power and responsibility, on the basis of the new statute, the Court of Appeals's remand and the amended Complaint, to rule that jurisdictional requirements in this case are fulfilled.

\*/ These rulings were by Sirica, C. J.

-5-

B. Plaintiffs Have Standing to Bring This Action

Subsection (b) of P.L. 93-190 declares that:

"The Senate Select Committee on Presidential Campaign Activities shall have authority to prosecute in its own name or in the name of the United States in the District Court of the United States for the District of Columbia any civil action heretofore or hereafter brought by said Committee to enforce or secure a declaration concerning the validity of any subpoena or order heretofore or hereafter issued by said Committee to the President or Vice President or any other officer of the United States or any officer or employee of any department of the United States to procure the production before the said Committee of any information, documents, taped recordings, or other materials relevant to the matters the Committee is authorized to investigate, and pray the said District Court to enter such judgment or decree in said civil action as may be necessary or appropriate to enforce any such subpoena or order."

This provision also makes clear that it is to apply to actions brought by the Committee prior to its enactment. Thus there is no longer any question as to plaintiffs' standing to bring this action.\*

It is also now established by P.L. 93-190 that plaintiffs may prosecute this action in the name of the United States by the attorneys of their choice. Subsection (c) states:

"The Senate Select Committee on Presidential Campaign Activities may be represented by such attorneys as it may designate in any action prosecuted by said Committee under this Act."

This provision eliminates defendant's claim, with which this Court apparently agreed (File Opinion pp. 7-8), that suits

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\*/ It was always certain, however, as pointed out at p. 13 of our Supplemental Memorandum In Support of Plaintiffs' Motion for Summary Judgment, that plaintiffs' stake in the discharge of their official responsibilities invested them with standing to bring this action under applicable legal principles as they existed before the passage of this statute.



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brought in the name of the United States must, under 28 U.S.C. § 516, be prosecuted by the Attorney General or his subordinates. \*/

C. The Committee, Under S. Res. 60 and S. Res. 194, Has And Had Full Authority to Subpena the President

The President has contended that the Committee, under S. Res. 60, lacked authority to issue subpoenas to him. Plaintiffs, on the other hand, have asserted that it is plain from the language of S. Res. 60 and the context of its passage that this Resolution authorizes subpoenas to the President.

As previously observed, S. Res. 60 empowers the Committee to investigate the extent of the President's own possible involvement in unethical, illegal, or improper conduct in the presidential campaign and election of 1972 and was, in fact, passed in an atmosphere of widespread public concern regarding the possible participation of the President himself in certain aspects of the Watergate affair. See S. Res. 60, Sec. 1 (a) and 119 Cong. Rec. at S2233 (1973) (remarks of Senator Ervin). Moreover, Sec. 3 (a) (5) of S. Res. 60 authorizes the Committee to issue subpoenas duces tecum to "any . . . officer . . . of the executive branch of the United States Government," a term which obviously includes the President.\*\*/ Thus it has always been apparent to plaintiffs that subpoenas to the President were authorized.

\*/ Section 516 provides for prosecution of suits brought in the name of the United States by the Attorney General or his subordinates "except as otherwise authorized by law." The prosecution of the present suit by attorneys of the Committee's designation is now, under the terms of § 516, "authorized by law," i.e., the provisions of P.L. 93-190.

\*\*/ Both S. Res. 60 and the United States Constitution refer to the "office of the President." See S. Res. 60, Secs. 1 (a), 2 (7), 2 (9), 2 (11) and U. S. Const. Art. II, Sec. 1, Clauses 1, 5, 7.

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The full Senate has now unanimously affirmed plaintiffs' view. On November 7, 1973, it enacted S. Res. 194, which provides in Section 1:

"By S. Res. 60, Ninety-third Congress, first session (1973), section 3 (a) (5), the Select Committee on Presidential Campaign Activities was and is empowered to issue subpoenas for documents, tapes, and other material to any officer of the executive branch of the United States Government. In view of the fact that the President of the United States is, as recognized by S. Res. 60, an officer of the United States, and was a candidate for the office of President in 1972 and is therefore a person whose activities the select committee is authorized by S. Res. 60 to investigate, it is the sense of the Senate that the select committee's issuance on July 23, 1973, of two subpoenas duces tecum to the President for the production of tapes and other materials was and is fully authorized by S. Res. 60. Moreover, the Senate hereby approves and ratifies the committee's issuance of these subpoenas."

This Resolution exposes defendant's statement that "it is beyond belief that any member of the Senate" in enacting S. Res. 60 "had any thought that he was voting to empower the Committee to take the unprecedented and unauthorized action that has led to the present litigation"\*/ as the hyperbole it always was. The Senate has now put its imprimatur on plaintiffs' reading of S. Res. 60 and fully ratified its action in subpoenaing the President\*\*/

\*/ Brief of Richard M. Nixon In Opposition to Plaintiffs' Motion For Summary Judgment, p. 48 (hereinafter cited as "Br.")

\*\*/ In *Barenblatt v. United States*, 360 U.S. 109, 118-20 (1959), the Supreme Court found that a Resolution of the House of Representatives raising the status of the House Un-American Activities Committee to that of a standing Committee served, along with other House resolutions and actions, to validate past actions by the Committee and to define the scope of its authority under its enabling resolution. The Court there said (p. 119):

"Just as legislation is often given meaning by the gloss of legislative reports, administrative interpretation and long usage, so the proper meaning of an authorization to a congressional committee is not to be derived alone from its abstract terms unrelated to the definite context furnished them by the course of congressional actions."

In *FHE Oil Co. v. Commissioner of Internal Revenue*, 150 F.2d 857, 858 (5th Cir. 1945) (per curiam), the Court stated that a legislative resolution "is an expression of opinion on a point of law . . . would of course be entitled to most respectful consideration by the courts . . ." See further, *Shelton v. United States*, 131 U.S. App. D.C. 315, 320, 404 F.2d 1292, 1296 (1968) cert. denied, 393 U.S. 1024 (1969). Cf. *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 380-81 (1970) where the Supreme Court said that "subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction."

D. Plaintiffs Were Authorized to Bring This Action Against the President

S. Res. 194 also provides a complete answer to defendant's assertion that this suit was not authorized because plaintiffs did not receive prior Senate approval for its instigation pursuant to S. Res. 60, Sec. 3 (a) (6), which empowers the Committee to "make to the Senate any recommendations it deems appropriate" respecting noncompliance with its subpoenas.

Section 2 of S. Res. 194 declares:

"On August 9, 1973, the select committee and its members instituted suit against the President of the United States in the United States District Court for the District of Columbia to achieve compliance with the two subpoenas referenced in section 1 above, and since that time, in both the district court and the United States Court of Appeals for the District of Columbia Circuit, have actively pursued this litigation. It is the sense of the Senate that the initiation and pursuit of this litigation by the select committee and its members was and is fully authorized by applicable custom and law, including the provisions of S. Res. 262, Seventieth Congress, first session (1928). In view of the entirely discretionary provisions of section 3 (a) (6) of S. Res. 60, it is further the sense of the Senate that the initiation of this lawsuit did not require the prior approval of the Senate. Moreover, the Senate hereby approves and ratifies the actions of the select committee in instituting and pursuing the aforesaid litigation."

In view of this approval and ratification by the Senate of the Committee's action in suing the President, defendant's claim of no authority, while always extremely dubious, is now totally untenable.

E. The Committee, in Subpoenaing and Suing the President, Is Acting with Valid Legislative Purposes

The President has recognized that the "power of the Congress to conduct investigations is inherent in the legislative process and is broad" (Br. 38) and that "the Senate is authorized to investigate campaign practices to see if legislation is needed in that area" (Br. 44). But he has contended that the

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Committee's investigation is unconstitutional because the Committee is usurping judicial power, conducting a criminal trial and acting without valid legislative purpose.

We have previously demonstrated to the Court why these assertions are unsupportable. As already observed, it is well settled that the Congress, as it has since the beginning of the Nation, may investigate wrongdoing and maladministration by executive officials pursuant to its constitutional responsibilities to determine the need for legislation and inform the public of executive misconduct. Perhaps the clearest expression of this power is found in the Teapot Dome cases where the Supreme Court sustained broad Senate inquiries into criminal conduct in the executive branch. McGrain v. Daugherty, 273 U.S. 135 (1927); Sinclair v. United States, 279 U.S. 263 (1929).

We have already informed the Court of the relation of the Committee's investigations to legislative recommendations now under consideration. If, for example, it is concluded that the President and his closest subordinates were involved in serious wrongdoing relating to the 1972 presidential campaign and election, far-reaching legislative remedies may be necessary. In such circumstance, the Committee might recommend that presidential tenure be limited to one term and that the participation of the president in the campaign to choose his successor be drastically limited, or the Committee might propose a radically new campaign financing system that would severely curtail the amount of private monies that could be contributed. It would be folly to proceed to the enactment of such far-reaching legislation without knowing if the abuse has been great enough to warrant it. But it would be equally foolish to refrain from needed legislation if such serious abuse of the election process did occur -- what the Committee is attempting to discover by this suit.

We have also pointed out that revelation of the extent of

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executive wrongdoing to the public is necessary in order to gain public support for any legislation the Committee may propose. And we have noted that the Committee has a constitutional responsibility to inform the public of the extent of the corruption in the executive branch in connection with the most recent presidential campaign and election. The Supreme Court, in both Watkins v. United States, 354 U.S. 178, 200, n.33 (1957) and United States v. Rumely, 345 U.S. 41, 43 (1953) has affirmed the power and responsibility of Congress to inquire into and publicize wrongdoing in the executive branch and has, in fact, proclaimed that the "informing function" of Congress "should be preferred even to its legislative function." It is through the "informing function" that public confidence in the integrity of governmental processes can best be restored. The revelation of governmental corruption also serves as a deterrent to future malfeasance.\*

\*/ See also, Delaney v. United States, 199 F.2d 107, 114-15. (1st Cir. 1952); Silverthorne v. United States, 400 F.2d 627, 633-34 (9th Cir. 1968); In Re: Application of United States Senate Select Committee on Presidential Campaign Activities, Misc. No. 70-73 (D.D.C. June 12, 1973), File Opin. at 17. See further the discussion in section III, this memorandum.

The President has accused the Committee of attempting "to expose for the sake of exposure," conduct he says is condemned by Watkins. See 354 U.S. 178, 200. But that case indicates that exposure for the sake of exposure is impermissible only where private affairs are involved. As suggested by the following passage from that opinion (at p. 187), it is perfectly proper to expose corruption in the absence of immediate legislative intentment (which, of course, the Committee has) when the misconduct revealed is that of public officials in the executive branch:

" . . . . The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste. But, broad as is this power of inquiry, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress." (emphasis added)

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Were there any doubt that the Committee has been and is acting with valid legislative purpose in subpoenaing and suing the President, it has been removed by the Senate through S. Res. 194. ~~Section 3 of this Resolution states:~~

"The select committee and its members, by issuing subpoenas to the President and instituting and pursuing litigation to achieve compliance with those subpoenas, were and are acting to determine the extent of possible illegal, improper, or unethical conduct in connection with the Presidential campaign and election of 1972 by officers or employees of the executive branch of the United States Government or other persons. It is the sense of the Senate that, in so doing, the select committee and its members were and are engaged in the furtherance of valid legislative purposes, to wit, a determination of the need for and scope of corrective legislation to safeguard the processes by which the President of the United States is elected and, in that connection, the informing of the public of the extent of illegal, improper, or unethical activities that occurred in connection with the Presidential campaign and election of 1972 and the involvement of officers or employees of the executive branch or others therein. It is further the sense of the Senate that the materials sought by the committee's subpoenas are of vital importance in determining the extent of such involvement and in determining the need for and scope of corrective legislation.

In view of this statement of approbation by the unanimous Senate, it is exceedingly difficult for defendant to continue to assert that the Committee proceeds without valid legislative purpose. It is even more difficult for him to overcome the presumption that a legislative committee is acting with legitimate legislative purpose. This presumption has been repeatedly recognized by the Supreme Court (e.g., McGrain v. Daugherty, supra, 273 U.S. at 178; Barenblatt v. United States, supra, 360 U.S. at 133; Watkins v. United States, supra, 354 U.S. at 200), and defendant has adduced no facts that would negate it.

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II. The Court Has the Power and Responsibility to Resolve This Controversy

The Court of Appeals in Nixon v. Sirica concluded that the Federal Courts have full power to decide the legal validity of a presidential assertion of executive privilege in response to evidentiary subpoenas issued by a coordinate branch. The Court held that the President is not, by virtue of his office, immune from judicial process, for the "Constitution makes no mention of special presidential immunities." (p. 17). The Court also ruled that the President's mere assertion of privilege does not conclude the judiciary, for such privilege as he enjoys is neither absolute nor unreviewable. The issue of executive privilege is fully justiciable, for "whenver a privilege is asserted . . . . it is the courts that determine the validity of the assertion and the scope of the privilege." (p. 25).

These rulings, while made in the context of subpoenas issued by the grand jury, are fully applicable here. There is no warrant in the Constitution for erecting a presidential immunity from judicial process simply because the plaintiffs are a duly authorized congressional committee and its members rather than the Special Prosecutor representing the grand jury.\*/ Nor is there any basis for concluding that a presidential assertion of privilege becomes unreviewable when made against the legislature. The Supreme Court has stated that the principle that "the public has a right to every man's evidence" is just as applicable to legislative investigations as to judicial

\*/ As the Court stated in Nixon v. Sirica (p. 12), the fact that the courts may not have physical power to enforce a judgment against the President does not deprive them of authority to pass upon the legal validity of a presidential claim of privilege. Moreover, plaintiffs in this suit seek only a declaratory judgment at this juncture so that the question of judicial power to enforce a command against the Chief Executive is not now before the Court.

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proceedings. United States v. Bryan, 339 U.S. 323, 331 (1950).

This right of the public would be wholly subverted if the executive could, by its own say-so, disregard any and all legislative inquiries. As the Court of Appeals pointed out in Nixon v. Sirica:

"If the claim of absolute privilege was recognized, its mere invocation by the President or his surrogates could deny access to all documents in all the Executive departments to all citizens and their representatives, including Congress . . . . Support for this kind of mischief simply cannot be spun from incantation of the doctrine of separation of powers." (p. 27).  
(emphasis added)

As this quotation indicates, Nixon v. Sirica also makes clear that the principle of separation of powers does not preclude the courts from adjudicating a controversy between two coordinate branches of government concerning an otherwise justiciable issue of privilege. The coordinate branches involved here are the executive and the legislative. Nixon v. Sirica likewise involved a controversy between coordinate branches -- the President as a representative of the executive branch and the Special Prosecutor as a representative of the grand jury and hence the judicial branch. But, as there stated:

"/This circumstance/ does not make the task of resolving the conflicting claims any less judicial in nature. Throughout our history there have frequently been conflicts between independent organs of the federal government . . . . When such conflicts arise in justiciable cases, our constitutional system provides a means for resolving them -- one Supreme Court." (p. 26).\*/

\*/ These statements are supported by the Supreme Court's analysis in Powell v. McCormick, 395 U.S. 486 (1969), which held that the refusal of the House of Representatives to seat a member was reviewable by the judiciary. Powell states that, as a general rule, the judiciary has the duty to decide otherwise justiciable issues unless the Constitution contains a "textually demonstrable commitment" of that issue to a coordinate branch. 395 U.S. at 519. Since the Constitution contains no "textually demonstrable commitment" to a coordinate branch of the issue of executive privilege, the judiciary bears the responsibility for resolving that issue.



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This ruling is equally applicable to the present dispute.

The teaching of Nixon v. Sirica -- that the courts have the responsibility to resolve otherwise justiciable controversies between coordinate branches of government -- is fully confirmed by precedents involving controversies between the executive and the legislative. For example, in United States v. Lovett 328 U.S. 303 (1946), the Supreme Court decided that a congressional effort to discharge designated individuals from government employment by cutting off salary appropriations was a constitutionally prohibited bill of attainder. In Myers v. United States, 272 U.S. 52 (1926), the Court passed on the President's constitutional power to remove a government employee from office contrary to congressional statute. Congress' constitutional authority to limit the President's removal power was also at issue in Humphrey's Executor (Rathbun) v. United States, 295 U.S. 602 (1935).\*/

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While these decisions fully confirm the Court's authority and responsibility to resolve the legislative-executive controversy involved here, the judiciary understandably might

\*/ Other relevant Supreme Court cases in this vein include the Pocket Veto Case, 279 U.S. 655 (1924), (validity of a pocket veto by the President); United States v. Klein, 13 Wall. (80 U.S.) 128 (1871) (congressional effort to curtail presidential pardon); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (presidential seizure of steel mills held unconstitutional as invasion of Congress' legislative powers). And recent decisions of this Court have reaffirmed that the principle of separation of powers does not preclude the courts from resolving conflicting claims of presidential and congressional power. Kennedy v. Sampson, F.Supp. (D.D.C., C.A. No. 1583-72, August 15, 1973) (Senator's challenge to validity of President's pocket veto); Williams v. Phillips, 360 F.Supp. 1363 (D.D.C., 1973) (Senatorial challenge to validity of Presidential appointment of acting OEO director without Senate confirmation); Local 2677, Government Employees v. Phillips, 358 F.Supp. 60 (D.D.C. 1973) (Presidential "phase-out" of OEO not authorized by Congress).

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be reluctant to become continuously involved in legislative-executive struggles over disclosure by the executive of information to Congress. But decision of the present controversy would not necessarily be a precedent for such continuing involvement, for it is distinguished by several special features.

First, this controversy is fully ripened and the normal processes of political accommodation between Congress and the executive have been exhausted. The Committee's demand for the materials it seeks has been approved by the entire Senate in S.Res 194. Moreover, the public importance of the Committee's efforts has also been acknowledged by the entire Congress through the passage of Public Law 93-190. That statute not only provides the Court with jurisdiction to hear the controversy but empowers the Court to enter any "such judgement or decree... as may be necessary or appropriate to enforce obedience" to the subpoenas involved here. Public Law 93-190 therefore represents a determination by Congress, not vetoed by the President, that the present controversy is fully justiciable and should be resolved by the courts. It is thus plain that we do not have here an ordinary controversy between the executive and a congressional committee seeking information from it, but one where the Senate through resolution and the full Congress by statute have approved the maintenance of this suit. These unique factors might work to diminish the precedential value of a decision herein that this case is justiciable.

Another distinguishing factor of great significance is that this case concerns a congressional investigation of allegations of serious wrongdoing by high officials. As previously

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noted, such investigations are necessary not only to consider the need for corrective legislation but also to inform the public, provide a deterrent against future wrongdoing, and restore public confidence in the integrity of governmental processes. These important functions would be subverted if high executive officials could decline, on claim of privilege, to produce needed information to Congress with the assurance that the courts would refuse to resolve the controversy.

In normal cases, the Congress has means other than civil litigation to vindicate its investigatory authority. The Committee in an ordinary case could seek enforcement of its subpoena by the Senate Sergeant-at-Arms, or it could, pursuant to 2 U.S.C. §192, initiate contempt of Congress proceedings. But where a high executive official is involved, particularly the President, these usual methods of vindicating Congress' authority are not appropriate.\*/

Additional remedies are available to Congress where a subordinate executive official resists investigation of a program for which he is responsible. In such a case, Congress might properly terminate authorization for the program or reduce its funding on the premise that Congress should not support programs if denied the information necessary to

\*/ It would obviously be unseemly to send the Sergeant-at-Arms to the White House to arrest the President and bring him before the bar of the Senate or to initiate statutory contempt procedures against him. We take it that the President would agree with this assessment for, in his Petition for Writ of Mandamus (p. 5) in *Nixon v. Sirica*, he stated that "to refuse to comply with this Court's order of August 29, 1973, and await further action would be unnecessary and would only delay resolution" of that case. Moreover, a criminal proceeding against the President is a manifestly awkward vehicle for determining the serious constitutional question here presented. We note, although by no means accept, the assertion of defendant President's counsel, that the President may not be criminally tried until he is impeached, a position that would, if adopted, foreclose the criminal contempt procedures embodied in 2 U.S.C. § 192.

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evaluate their content and implementation. But where, as here, it is the President who resists disclosure and the investigation does not relate to a particular governmental program, a feasible remedy of this sort is not available.

Nor is impeachment an adequate remedy for the problem of executive resistance to legislative investigations. Impeachment is a lengthy, difficult process and is a drastic step posing serious hazards to the well-being of the body politic. As this Court stated in its decision in the Special Prosecutor's case, impeachment "is not so designed that it can function as a deterrent in any but the most excessive cases" and in many situations "impeachment is not a reasonable solution." (pp. 6,9) And, as the Court of Appeals ruled in Nixon v. Sirica, "the Impeachment clause does not imply immunity from routine court processes." (p. 18) Obviously a court proceeding is a far preferable means of resolving a dispute over the legal validity of a claim of executive privilege.

Thus where legislative investigations of possible wrongdoing by the President or high executive officials are involved, other processes for vindicating congressional authority in the face of executive recalcitrance are either not available or not appropriate, and a judicial proceeding is the means best suited for resolving the legal issue of executive privilege. Also, as the Court of Appeals observed in Nixon v. Sirica (pp. 25-26, n. 70) the judiciary passes on legislative assertions of privilege in opposition to investigations or prosecutions initiated by the executive. E.g., Gravel v. United States, 408 U.S. 606 (1972); United States v. Brewster, 408 U.S. 501 (1972). It would thus be inequitable as well as unreasonable to deny the legislative branch reciprocal access to the courts

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to resolve the validity of asserted executive privileges. If the courts were to refuse to decide such cases, the Congress would be forced to choose between the emasculation of its power to investigate executive wrongdoing or the use of provocative sanctions against the President in a trial of strength that would threaten near intolerable stress on the constitutional fabric. But such dilemmas need not be faced under our system of government where "it is the responsibility of [the judiciary] to act as the ultimate interpreter of the Constitution." Powell v. McCormack, 395 U.S. at 549.

The courts' responsibility in cases such as the present also has a vital ameliorating function for, as the Supreme Court has recently noted, the normal processes of political accomodation between the executive and the legislative apparently work only where the basic contours of their respective constitutional powers are settled by the "neutral authority" of the judiciary:

"The check-and-balance mechanism, buttressed by unfettered debate in an open society with a free press, has not encouraged abuses of power or tolerated them long when they arose. This may be explained in part because the third branch has intervened with neutral authority. See, e.g., United States v. Lovett, 328 U.S. 303 (1946)."  
United States v. Brewster, 408 U.S. 501, 523.  
 (1972) (Berger, C. J.)\*

The present controversy cries out for such intervention.

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\*/ Mr. Justice Jackson has written that "[s]ome arbiter is almost indispensable when power . . . is also balanced between different branches, as the legislative and the executive . . . Each unit cannot be left to judge the limits of its own power." Jackson, The Struggle For Judicial Supremacy (1941) at p. 9. The wisdom of his observation has a unique relevance to the present case.

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### III. The President Is Not Privileged to Suppress the Evidence Sought by the Committee

In Nixon v. Sirica, the Court of Appeals held that "application of Executive privilege depends on a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case." (p. 28)(footnote omitted) That test, of course, was formulated in the context of a grand jury subpoena. Where it is the Congress, the elected representatives of the people, that seeks information, there are powerful arguments against recognizing any constitutional privilege on the part of the executive to suppress pertinent evidence. \*/ But these arguments need not be addressed in this case for under the balancing test articulated in Nixon v. Sirica, the Committee is entitled to the evidence sought by this litigation.

The public interests in disclosure of the evidence sought here are powerful and pervasive. Where wrongdoing in the highest executive offices has possibly occurred, it is vital that Congress be able to consider intelligently the need for corrective legislation to prevent its reoccurrence. As explained in McGrain v. Daugherty, 273 U.S. 135 (1927)--which sustained a Senate investigation of the Justice Department's role in the Teapot Dome scandal--the investigatory power is essential to the law-making function, for without information it is impossible to legislate wisely or effectively. \*\*/ And, as the Supreme

\*/ See Berger, Executive Privilege v. Congressional Inquiry, 12 U.C.L.A. L. Rev. 1044, 1288 (1965). As pointed out in Nixon v. Sirica, the failure of the Constitution to so much as mention any executive privilege stands in stark contrast to the specific, limited grant of privilege to the legislative. "This silence cannot be ascribed to oversight." (p. 17)

\*\*/ See also Sinclair v. United States, 279 U.S. 263 (1929).

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Court also pointed out in Watkins v. United States, 354 U.S. 178 (1957), investigation of executive wrongdoing serves other values as well:

"~~There is a~~ power of the Congress to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government. That was the only kind of activity described by Woodrow Wilson in Congressional Government where he wrote: 'The informing function of Congress should be preferred even to its legislative function.' Id., at 303. From the earliest times in its history, the Congress has assiduously performed an 'informing function' of this nature." 354 U.S. at 200, n. 33. \*/

The above principles completely sustain the Committee's efforts to obtain the information sought here. Created by unanimous vote of the Senate, the Committee is charged with investigating allegations of serious wrongdoing at the highest executive levels in connection with the 1972 presidential campaign and election and is instructed to consider the need for corrective legislation. The evidence which the Committee seeks from defendant President is vital to the completion of its work.

\*/ These principles were recently reaffirmed by this Court in In Re: Application of United States Senate Select Committee on Presidential Campaign Activities, Misc. No. 70-73, June 12, 1973, File Opin. at 17. In United States v. Rumely, 345 U.S. 41 (1953), the Supreme Court termed the congressional informing function "indispensable" and also quoted Woodrow Wilson with approval:

"It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function.' Wilson, Congressional Government, 303." Id. at 43.

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The Committee has received conflicting evidence as to the extent of wrongdoing at the pinnacle of government, much of it through testimony authorized by the President himself. As the Statement of Material Facts As To Which There Is No Genuine Issue demonstrates, there has been serious, potentially credible evidence presented to the Committee tending to show that the Chief Executive himself was engaged in wrongdoing. See paras. 9, 11-15. There has also been evidence tending to exonerate him of such charges. And the extent of wrongdoing by other officials is also the subject of sharply conflicting evidence received by the Committee. The pertinent evidence already obtained consists in considerable part of conflicting testimony by witnesses regarding their conversations with the President. The Committee would face difficult problems in resolving these conflicts if its assessment of the credibility of the respective witnesses were the sole basis of decision. But the Committee's investigations have revealed the existence of documents and tape recordings of Presidential conversations that it has now subpoenaed. This evidence, bearing directly on the matters in dispute, would prove of immense and perhaps decisive value in determining the precise extent of malfeasance in the executive branch.

An informed and accurate determination by the Committee of the precise extent of executive wrongdoing would be of great importance to Congress in deciding the need for and the form of corrective legislation respecting the conduct of political campaigns. Most particularly, it would aid in a determination whether legislative regulation of presidential involvement in political campaigns is necessary. Moreover, revelation of the extent of the corruption in the executive branch would help engender the public support needed for basic reforms in our electoral system. If Presidential involvement were shown, there might arise a strong public mandate for thoroughgoing reforms; if no Presidential involvement were revealed, the public might



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be satisfied that lesser measures were adequate. The evidence sought is also important in other ways to Congress' discharge of its "informing function." So long as the executive is allowed to resist full disclosure of evidence bearing on its own wrongdoing, public confidence in the self-corrective processes of government will remain at low ebb. Public revelation of all Watergate facts is also needed to deter repetition in the future of wrongdoing by governmental officials. \*/

It is not merely the plaintiff Committee which has concluded that the evidence sought here is vital to Congress. By the adoption of S. Res. 194, the entire Senate has unanimously endorsed the Committee's efforts to obtain such evidence. The Resolution states that the Senate "approves and ratifies the committee's issuance" of the subpoenas involved here, and also "approves and ratifies" the Committee's institution of this litigation to achieve compliance with these subpoenas. The Resolution further provides that:

"The select committee and its members, by issuing subpoenas to the President and instituting and pursuing litigation to achieve compliance with those subpoenas, were and are acting to determine the extent of possible illegal, improper, or unethical conduct in connection with the Presidential campaign and election of 1972 by officers or employees of the executive branch of the United States Government or other persons. It is the sense of the Senate that, in so doing, the select committee and its members were and are engaged in the furtherance of valid legislative purposes, to wit, a

\*/ Release of materials to the Special Prosecutor will not necessarily fulfill an "informing function" because there is no assurance that such materials will be made available to Congress or the public. Moreover, as noted by the Court of Appeals in *Nixon v. Sirica* (p. 6), the integrity of Congress' own processes is at stake here, for the conflicts in the testimony of witnesses before the Committee raise a serious question whether perjury has been committed. The evidence sought by the Committee would be of vital importance in resolving that question.

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determination of the need for and scope of corrective legislation to safeguard the processes by which the President of the United States is elected and, in that connection, the informing of the public of the extent of illegal, improper, or unethical activities that occurred in connection with the Presidential campaign and election of 1972 and the involvement of officers or employees of the executive branch or others therein. It is further the sense of the Senate that the materials sought by the committee's subpoenas are of vital importance in determining the extent of such involvement and in determining the need for and scope of corrective legislation." \*/

In addition, the entire Congress has enacted Public Law 93-190, empowering the Committee to maintain and the Courts to entertain litigation to enforce the subpoenas previously issued by "said Committee to the President." Under the circumstances, the statute represents a Congressional recognition of the public importance of the materials sought; it is, moreover, certainly arguable that a Congress that did not support the Committee's efforts to achieve the materials subpoenaed would not have passed a statute that aids it in doing so. \*\*/ In assessing the public interests in disclosure, these actions by the elected representatives of the people are, we submit, entitled to great deference. Whatever legitimate interest the executive may have in withholding information must inevitably shrink in the face of such action, for "where the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb. . . ." Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)

\*/ Senator Ervin, in his affidavit to this Court, (attached to The Supplemental Memorandum In Support of Plaintiffs' Motion For Summary Judgment) has also described the evidence sought by the subpoenas as "vital to the exercise of the Committee's functions." See para. (2).

\*\*/ The Senate, of course, is supportive, as demonstrated by S. Res. 194.

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(emphasis added). If, in the face of this Congressional action, the courts were to hold that the executive may suppress evidence relating to official wrongdoing, the power of the legislature to investigate such wrongdoing would be effectively destroyed. In these circumstances, we believe that the public interest in disclosure to Congress is at least as great as the public interest in disclosure to the Special Prosecutor. \*/

On the other hand, there is no public interest in permitting the executive to suppress evidence that may relate to executive wrongdoing. In normal circumstances, there is a legitimate public interest in preserving the confidentiality of certain executive deliberations in order to promote full and frank discussion. But where possible criminal conduct of the President or his close associates is involved, this interest in confidentiality is overwhelmed by the public interest in preventing the concealment of official wrongdoing.

As the Supreme Court observed in Gravel v. United States, 408 U.S. 606, 627 (1972), the "so-called executive privilege" has never been applied to shield wrongdoing. It would be plainly intolerable if a privilege to promote confidentiality of executive communications were extended to the point of permitting executive suppression of evidence bearing on criminal wrongdoing by those in high public office. As pointed out by the Court of Appeals in Nixon v. Sirica (p. 7), quoting Committee for Nuclear Responsibility, Inc. v. Seaborg, 149 U.S. App. D.C. 385, 391, 463 F. 2d 788, 794 (1971), if such were the law, an executive official "would have the power on his own say so to cover up all evidence of fraud and corruption."

\*/ Indeed, we respectfully submit that the interest of Congress in obtaining evidence is weightier than that of the grand jury. For however regrettable it might be if a few guilty individuals were to go unpunished for want of relevant evidence, there is an even greater public interest in legislation, should it be required, to prevent the subversion of high executive office in the future. There is, moreover, a compelling public need for total revelation of all the facts of the Watergate affair, a need that, most probably, can only be met by Congress in the exercise of its "informing function."

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Counsel for the defendant President have already conceded that he may not invoke executive privilege to cloak his own possible wrongdoing. The Reply Brief filed on behalf of the President in this Court in the Special Prosecutor's case asserts:

"It is, of course, true that to 'the extent that the conversations [between the President and his aides] do not concern the legitimate affairs of Government and the performance of the official duties and responsibilities of the President and his staff' they are not protected by executive privilege."

And other pleadings filed on behalf of the President in that proceeding likewise appear to concede that executive privilege may not be used to suppress evidence bearing on the President's own wrongdoing. \*/ This concession is fully applicable here. As noted, (p.21 , infra) the Committee has already received serious, potentially credible evidence which, if believed, would tend to implicate the President in serious wrongdoing. The President has in his possession additional evidence--tapes and documents--that could be of crucial and perhaps decisive value in resolving the conflicting evidence before the Committee and developing the true facts. In these circumstances, the principle that an executive official may not invoke privilege to suppress evidence bearing on his own possible wrongdoing--a principle already conceded by the President's counsel--is directly applicable.

Nor do we perceive a public interest in permitting the President to suppress evidence relating to possible wrongdoing by his closest associates. On the one hand, the possibility of inquiry into illegal executive activity can have little, if

\*/ See Misc. No. 47-73, Resp. Brief in Opp. pp. 21-23. At the oral argument before this Court in the Special Prosecutor's case, counsel for the President conceded that any executive privilege which the President might enjoy would be limited to matters relating to the performance of his official duties. Tr. p. 16. Certainly, materials relating to criminal activities in connection with the 1972 presidential campaign and election would not concern "official duties."

-26-

any, chilling effect on wholly lawful executive deliberations. On the other hand, permitting executive officials to suppress such evidence could invite abuses. A President is bound to his close associates by strong ties of mutual self-interest as well as friendship. Revelation of wrongdoing on their part would almost certainly redound to the President's own political disadvantage. In such a situation, a President with the best of intentions may be all too prone to rationalize a claim of privilege in terms of a supposed "public interest" in suppression that is wholly insubstantial. At worst, the executive in such a situation could "on his own say so cover up all evidence of fraud and corruption." Nixon v. Sirica, p. 30.

The courts have been fully aware of the potential hazards in a privilege to suppress evidence relating to official misconduct, and have accordingly refused to create such privileges. As pointed out by Mr. Chief Justice Burger on behalf of the Supreme Court in United States v. Brewster, 408 U.S. 501, 521 (1972): "The laws of this country allow no place or employment as a sanctuary for crime... ." One of the earliest cases involving a claim of executive privilege in the context of charges of criminal wrongdoing by government officials was United States v. Dohoney and Fall (Sup. Ct. Dist. Col. 1926), a prosecution arising out of the Teapot Dome Scandal. The Court there rejected a formal claim by the Secretary of the Navy to suppress testimony concerning conversations between a Navy captain and a defendant regarding defense installations. The Court held that the testimony was relevant to the criminal charges, and that the government's interests in confidentiality could adequately be served by deleting the identity of a foreign power referred to in the conversation. Stenographic Record, 2-3, 2381-2384, 2392 et seq., reprinted in Morgan and

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Maguire, Cases and Materials on Evidence (3d ed. 1951) 405-409. See also, Rosee v. Chicago Board of Trade, 36 F.R.D. 684, 690 (N.D. Ill. 1965); Wood v. Breier, 54 F.R.D. 7, 12 (E.D. Wisc. 1972). \*/

The absence of any public interest in permitting presidential suppression of evidence relating to official misconduct is reinforced in the present case by the President's refusal to invoke executive privilege regarding testimony by executive officials before the Committee and elsewhere "concerning possible criminal conduct or discussions of possible criminal conduct." \*\*/ Our Statement of Material Facts, paras. 20-24

\*/ Cases arising under state law and considering analogous executive privileges reach the same conclusion. Attorney General v. Tufts, 239 Mass. 458, 491-92, 132 N.E. 322, 326 (1921); Metzler v. United States, 64 F. 2d 203 (9th Cir. 1933) (privilege arising under state statute). The privilege enjoyed by the judicial and legislative branches are likewise vulnerable when criminality is involved. Thus the petit and grand jurors' privilege--clearly the most significant in the workings of the judicial process--must yield in a case investigating criminal wrongdoing by a juror. Clark v. United States, 289 U.S. 1 (1933); See also, United States v. Proctor & Gamble Co., 356 U.S. 667, 684 (1958); United States v. Proctor & Gamble Co., 25 F.R.D. 495 (D.N.J. 1960). Even the legislator's privilege, grounded constitutionally on the specific language of the Speech and Debate Clause, does not offer a blanket shield to charges of criminal misconduct. In Gravel v. United States, 408 U.S. 606 (1972), the Court held that Senator Gravel's assistant could be compelled to testify about publication of the Pentagon Papers, which the Senator himself had read on the Senate floor. The Court went on to state that even the Senator could be interrogated by a grand jury concerning the sources of information he relied on in performing his legislative duties if criminal conduct were indicated. 408 U.S. at 622. In United States v. Brewster, 408 U.S. 501 (1972), a Senator's conviction for making a floor speech in return for a bribe was upheld on the ground that "t/aking a bribe is, obviously, no part of the legislative process or function." 408 U.S. at 526. In view of these authorities, it is hardly tolerable for the executive, who enjoys no constitutional grant of immunity, to assert a privilege which is denied to legislators and the judicial branch. Moreover, as remarked in our Memorandum Of Points And Authorities In Support Of Motion For Summary Judgment (pp. 26-7) comparable evidentiary privileges, such as the attorney-client privilege, do not apply where there is evidence of criminal conduct.

\*\*/ The language is from the President's May 22, 1973, statement on Watergate. The President's action in this regard was wholly consistent with historical practice. Whatever the record may be in other areas, the executive apparently has not, prior to this litigation, asserted any blanket privilege to thwart congressional investigations into executive wrongdoing, and, as detailed in the Historical Appendix to our Memorandum Of Points And Authorities In Support Of Motion For Summary Judgment, has frequently cooperated with legislative investigations into executive malfeasance.

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details the President's statements regarding his disinclination to invoke executive privilege and the extent of evidence already given to the Committee and otherwise revealed regarding the subject matters of the material under subpoena at the time the present motion for summary judgment was filed. These facts do not need repetition here, but we would point out that since that date numerous tapes and documents covered by our two subpoenas have been turned over to the Court and the Special Prosecutor, some in compliance with the grand jury subpoena, some voluntarily. For example, tapes of four conversations subpoenaed by the Committee have been released by the President to the Court in compliance with the grand jury subpoena, along with related documents, and certain White House files have now, it appears, been opened to the Special Prosecutor. The Court has listened to the four conversations involved and ruled on whatever "particularized claim: of privilege were asserted by the President. See Order dated December 19, 1973. It is highly significant that as to three conversations -- those on March 13 and 21 -- the President asserted no "particularized claim" of executive privilege and raised no such claim as to the "Watergate" portion of the September 15 tape. See the President's Analysis, Index and Particularized Claims of Executive Privilege For Subpoenaed Materials at pp. 14, 17, 18, 19 in Misc. No. 47-73.

As indicated by the Court of Appeals in Nixon v. Sirica, these actions have great significance for a judicial assessment of the public interest in disclosure of executive tapes and documents relating to the same subject matter as the evidence whose revelation has been permitted by the President:

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"Our conclusion that the general confidentiality privilege must recede before the grand jury's showing of need, is established by the unique circumstances that made this showing possible. In his public statement of May 22, 1973, the President said: 'Executive privilege will not be invoked as to any testimony concerning possible criminal conduct or discussions of possible criminal conduct, in the matters presently under investigation, including the Watergate affair and the alleged cover-up.' We think that this statement and its consequences may properly be considered as at least one factor in striking the balance in this case. Indeed, it affects the weight we give to factors on both sides of the scale. On the one hand, the President's action presumably reflects a judgment by him that the interest in the confidentiality of White House discussions in general is outweighed by such matters as the public interest, stressed by the Special Prosecutor, in the integrity of the level of the Executive Branch closest to the President, and the public interest in the integrity of the electoral process--an interest stressed in such cases as Civil Service Commission v. National Association of Letter Carriers and United States v. United Automobile Workers. . . .

"At the same time, the public testimony given consequent to the President's decision substantially diminishes the interest in maintaining the confidentiality of conversations pertinent to Watergate. The simple fact is that the conversations are no longer confidential. Where it is proper to testify about oral conversations, taped recordings of those conversations are admissible as probative and corroborative of the truth concerning the testimony. There is no 'constitutional right to rely on possible flaws in the witness's memory. \* \* \* /N/ other argument can justify excluding an accurate version of a conversation that the /witness/ could testify to from memory.' In short, we see no justification, on confidentiality grounds, for depriving the grand jury of the best evidence of the conversations available." (p. 31-32) (footnotes omitted)

These considerations are directly controlling here, for the President's May 22 statement related to testimony before the plaintiff Committee just as much as to testimony before the grand jury, and, in fact, much of the testimony that resulted from this statement was presented to the Committee, as the



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Court of Appeals noted in Nixon v. Sirica (p. 6). Hence the statement represents a Presidential recognition of the public interest in legislative access to evidence relating to official misconduct. And, by the same token, the President's asserted interests in confidentiality have been sharply eroded by the disclosures that have already been made to the Committee and elsewhere with his permission. As in Nixon v. Sirica, both of these factors weigh strongly in favor of disclosures here.

Moreover, there are additional reasons in this case for not allowing the President to pick and choose among the evidence in this case to be disclosed. We submit that it would be highly unfair to the Committee and the Congress, as well as the public they represent, to permit the President to toy with the investigatory process by withholding the best evidence available on matters as to which he has already permitted testimony. To paraphrase language from the decision in Lopez v. United States, 373 U.S. 427, 439 (1963) relied upon by the Court of Appeals in Nixon v. Sirica (p. 32):

"Stripped to its essentials, [the defendant President's] argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment. For no other argument can justify excluding an accurate version of a conversation that the agent could testify to from memory."

As Mr. Chief Justice Vinson stated, the basic principle against permitting selective disclosure in the context of testimony: "To uphold a claim of privilege in this case would open the way to distortion of facts by permitting a witness to select any stopping place in the testimony." Rogers v. United States, 340 U.S. 367, 371 (1950). Accordingly, it has been the settled policy of our law that one who, by selective disclosure, breaches a confidence protected by a privilege is held to have forfeited that privilege. \*/ This policy is fully applicable here.

\*/ See the discussion in our Memorandum Of Points And Authorities In Support Of Motion For Summary Judgment at pp. 30-1.

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CONCLUSION

The foregoing discussion demonstrates that application to this case of the balancing test enunciated in Nixon v. Sirica fully vindicates Congress' right to the evidence sought by the Committee. There is a strong public interest in effective legislative investigation of executive wrongdoing. The Committee has determined that the evidence it seeks here is necessary for the effective discharge of its investigatory and other legislative responsibilities, and that determination has been specifically reaffirmed by a unanimous Senate. The public importance of the controversy has been recognized by the entire Congress through the enactment of P.L. 93-190, a law that arguably would not have been passed had not the full Congress been supportive of the Committee's efforts to obtain the materials under subpoena. And the President has acknowledged the public interest in disclosure to Congress by permitting testimony and the revelation of evidence on the very matters involved in the Committee's subpoenas. These several considerations combine to make for a "uniquely powerful showing" of public interest in disclosure. Nixon v. Sirica, p. 30

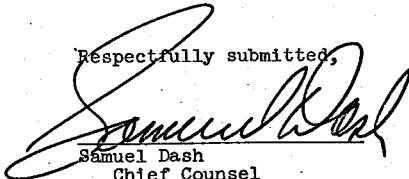
On the other hand, there is no public interest in permitting suppression of evidence relating to official misconduct. The normal interest in confidentiality vanishes when it becomes a cloak for possible wrongdoing, and it would be against the public interest to recognize a privilege whereby executive officials could suppress evidence relating to possible wrongdoing by themselves or their closest associates. Moreover, by permitting testimony and the disclosure of evidence relating to the very matters on which the Committee now seeks tapes and documents, the President has effectively dissipated whatever lingering public interest in confidentiality there might otherwise be in this case. To permit the President to pick and choose among the evidence offered to the Committee, withholding the best, is not

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only wholly unjustified, but represents a serious disservice to the legislature, the public, and to the integrity and accuracy of the investigatory process. The public interest in this case calls overwhelmingly for disclosure.

Plaintiffs' motion for summary judgment should be granted.

Respectfully submitted,



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THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES, et al.,

Plaintiffs

v.

RICHARD M. NIXON,  
individually and as President of the United  
States,

Defendant

FILED JAN 7 1974

JAMES F. DAVEY  
CLERK

Civil Action  
No. 1593-73

AMENDMENT TO COMPLAINT

The Complaint herein, filed on August 9, 1973, is hereby amended, with leave of Court\*~~and~~ without objection of defendant, as follows:

1. On page 4 of the Complaint, immediately preceding paragraph 10, the following paragraph is inserted:

"9a. The jurisdiction of this Court further rests on Public Law 39-190, codified as 18 U.S.C. § 1364, which became law on December 19, 1973, and which grants this Court 'original jurisdiction, without regard to the sum or value of the matter in controversy, of any civil action heretofore or hereafter brought by the Senate Select Committee on Presidential Campaign Activities . . . to enforce or secure a declaration concerning the validity of any subpoena . . . heretofore or hereafter issued by said Committee to the President . . . to procure the production before the said Committee of any information, documents, taped recordings, or other materials relevant to matters the said

\*/ Sirica, C. J.

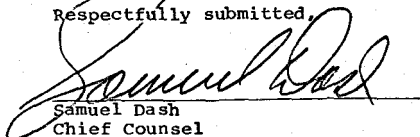
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Committee is authorized to investigate, and [this] Committee shall have jurisdiction to enter any such judgment or decree in any such civil action as may be necessary or appropriate to enforce obedience to any such subpoena or order.' This statute also establishes the Select Committee's authority to sue in its own name and in the name of the United States and to prosecute this action by the attorneys of its choice. A copy of P.L. 93-190 is appended hereto and made a part of this complaint by reference.

2. On page 7 of the Complaint, immediately preceding the heading "Cause of Action," the following paragraph is inserted:

"18a. On November 7, 1973, the Senate passed Senate Resolution 194, 93d Cong. 1st Sess., which approved and ratified the Committee's actions in subpoenaing and suing the President and stated that it is the sense of the Senate that the Committee, in so doing, was and is acting with valid legislative purposes and seeking information vital to the fulfillment of its legitimate legislative functions. A copy of S.Res 194 is appended hereto and made a part of this complaint by reference."

Respectfully submitted,



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-3-

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Attorneys for Plaintiffs

## PUBLIC LAW 93-190

## Ninety-third Congress of the United States of America

AT THE FIRST SESSION

Began and held at the City of Washington on Wednesday, the third day of January,  
one thousand nine hundred and seventy-three

## An Act

To confer jurisdiction upon the district court of the United States of certain civil actions brought by the Senate Select Committee on Presidential Campaign Activities, and for other purposes.

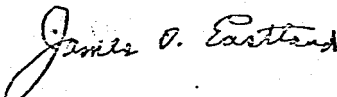
*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That (a) the District Court of the United States for the District of Columbia shall have original jurisdiction, without regard to the sum or value of the matter in controversy, of any civil action heretofore or hereafter brought by the Senate Select Committee on Presidential Campaign Activities, which was created on February 7, 1973, by Senate Resolution Numbered 60, to enforce or secure a declaration concerning the validity of any subpoena or order heretofore or hereafter issued by said Committee to the President or the Vice President or any other officer of the United States or any officer or employee of any department or agency of the United States to procure the production before the said Committee of any information, documents, taped recordings, or other materials relevant to matters the said Committee is authorized to investigate, and the said District Court shall have jurisdiction to enter any such judgment or decree in any such civil action as may be necessary or appropriate to enforce obedience to any such subpoena or order.

(b) The Senate Select Committee on Presidential Campaign Activities shall have authority to prosecute in its own name or in the name of the United States in the District Court of the United States for the District of Columbia any civil action heretofore or hereafter brought by said Committee to enforce or secure a declaration concerning the validity of any subpoena or order heretofore or hereafter issued by said Committee to the President or Vice President or any other officer of the United States or any officer or employee of any department of the United States to procure the production before the said Committee of any information, documents, taped recordings, or other materials relevant to the matters the Committee is authorized to investigate, and pray the said District Court to enter such judgment or decree in said civil action as may be necessary or appropriate to enforce any such subpoena or order.

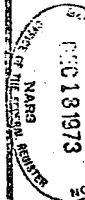
(c) The Senate Select Committee on Presidential Campaign Activities may be represented by such attorneys as it may designate in any action prosecuted by said Committee under this Act.



Speaker of the House of Representatives.



Vice President of the United States and  
President of the Senate, pro Tempore

93<sup>d</sup> CONGRESS  
1<sup>st</sup> SESSION

# S. RES. 194

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## IN THE SENATE OF THE UNITED STATES

NOVEMBER 2, 1973

Mr. ERVIN (for himself, Mr. BAKER, Mr. GURNEY, Mr. INOUE, Mr. MONTOLA, Mr. TALMADGE, and Mr. WEICKER) submitted the following resolution; which was ordered to be placed on the calendar.

NOVEMBER 7, 1973

Considered and agreed to

---

## RESOLUTION

Relating to S. Res. 60.

1      *Resolved, That—*

2      SECTION 1. By S. Res. 60, Ninety-third Congress, first  
3 session (1973), section 3 (a) (5), the Select Committee on  
4 Presidential Campaign Activities was and is empowered to  
5 issue subpoenas for documents, tapes, and other material to  
6 any officer of the executive branch of the United States Gov-  
7 ernment. In view of the fact that the President of the United  
8 States is, as recognized by S. Res. 60, an officer of the  
9 United States, and was a candidate for the office of President  
10 in 1972 and is therefore a person whose activities the select  
11 committee is authorized by S. Res. 60 to investigate, it is



1 the sense of the Senate that the select committee's issuance  
2 on July 23, 1973, of two subpoenas duces tecum to the Pres-  
3 ident for the production of tapes and other materials was  
4 and is fully authorized by S. Res. 60. Moreover, the Senate  
5 hereby approves and ratifies the committee's issuance of  
6 these subpoenas.

7 SEC. 2. On August 9, 1973, the select committee and its  
8 members instituted suit against the President of the United  
9 States in the United States District Court for the District of  
10 Columbia to achieve compliance with the two subpoenas ref-  
11 erenced in section 1 above, and since that time, in both the  
12 district court and the United States Court of Appeals for the  
13 District of Columbia Circuit, have actively pursued this litiga-  
14 tion. It is the sense of the Senate that the initiation and pur-  
15 suit of this litigation by the select committee and its members  
16 was and is fully authorized by applicable custom and law,  
17 including the provisions of S. Res. 262, Seventieth Congress,  
18 first session (1928). In view of the entirely discretionary  
19 provisions of section 3 (a) (6) of S. Res. 60, it is further  
20 the sense of the Senate that the initiation of this lawsuit did  
21 not require the prior approval of the Senate. Moreover, the  
22 Senate hereby approves and ratifies the actions of the select  
23 committee in instituting and pursuing the aforesaid litigation.

24 SEC. 3. The select committee and its members, by issuing  
25 subpoenas to the President and instituting and pursuing litiga-

1 tion to achieve compliance with those subpoenas, were and  
2 are acting to determine the extent of possible illegal, im-  
3 proper, or unethical conduct in connection with the Pres-  
4 idential campaign and election of 1972 by officers or  
5 employees of the executive branch of the United States Gov-  
6 ernment or other persons. It is the sense of the Senate that,  
7 in so doing, the select committee and its members were and  
8 are engaged in the furtherance of valid legislative purposes,  
9 to wit, a determination of the need for and scope of corrective  
10 legislation to safeguard the processes by which the President  
11 of the United States is elected and, in that connection, the  
12 informing of the public of the extent of illegal, improper, or  
13 unethical activities that occurred in connection with the  
14 Presidential campaign and election of 1972 and the involve-  
15 ment of officers or employees of the executive branch or  
16 others therein. It is further the sense of the Senate that the  
17 materials sought by the committee's subpoenas are of vital  
18 importance in determining the extent of such involvement  
19 and in determining the need for and scope of corrective  
20 legislation.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES, et al.,

Plaintiffs

v.

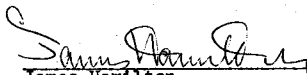
RICHARD M. NIXON, individually and as  
President of the United States,

Defendant

Civil Action  
No. 1593-73

CERTIFICATE OF SERVICE

I, James Hamilton, do hereby certify that on January 7,  
1974, I served copies of the attached Plaintiffs' Memorandum On  
Remand and Amendment to Complaint upon defendant President by  
having said copies hand-delivered to the offices of his counsel  
in the Executive Office Building, Pennsylvania Avenue,  
Washington, D. C.

  
James Hamilton  
Assistant Chief Counsel  
United States Senate  
Washington, D. C. 20510

Attorney for Plaintiffs

THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES, et al.,

Plaintiffs

v.

RICHARD M. NIXON, individually and as  
President of the United States,

Defendant

Civil Action  
No. 1593-73

ORDER

This matter having come before the Court on plaintiffs' request for expedited handling of the issues herein, it is hereby this \_\_\_\_ day of January, 1974,

ORDERED that:

(1) Plaintiffs shall file their Amendment To Complaint and Memorandum On Remand on or by Monday, January 7, 1974.

(2) Defendant shall file his Answer to the Amendment To Complaint and his response to Plaintiffs' Memorandum On Remand on or by Thursday, January 17, 1974.

John J. Sirica, Chief Judge

FILED 1/10/74

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON  
PRESIDENTIAL CAMPAIGN ACTIVITIES,  
ET AL.,

Plaintiffs,

v.

RICHARD M. NIXON, individually and  
as President of the United States,  
Defendant.

Civil Action No. 1593-73

O R D E R

This matter having come before the Court on  
plaintiffs' request for expedited handling of the issues  
herein, it is hereby

ORDERED that plaintiffs shall file their  
Amendment to the Complaint and Memorandum on Remand on  
or by January 7, 1974; and it is further

ORDERED that defendant shall file his Answer  
to the Amendment to the Complaint and his response to  
plaintiffs' Memorandum on Remand on or by January 17, 1974,  
said dates having been set by Chief Judge Sirica prior to  
transfer of the file to the undersigned.

  
UNITED STATES DISTRICT JUDGE

January 9, 1974.

January 9, 1974

BY HAND

The Honorable Gerhard A. Gesell  
United States District Judge  
United States Court House  
Constitution Avenue and  
John Marshall Place, N.W.  
Washington, D.C.

Dear Judge Gesell:

The Court has requested that we supply it with the relevant legislative history of Public Law 93-190. This history is attached along with that of Senate Resolution 194, 93d Cong., 1st Sess., (November 7, 1973). In order to assist the Court in understanding the progression of the bill and resolution through Congress, we present below a brief guide to the legislative history of both provisions.

Both S. Res. 194 and the original version of P.L. 93-190 were introduced in the Senate on November 2, 1973 (see Tab A). The initial jurisdictional bill, which was designated S. 2641 and is attached at Tab B, was far broader than the bill that eventually became law. The first bill would have provided jurisdiction for suits to enforce congressional subpoenas issued to the President or other officers and employees of the executive branch by either House of Congress, any committee or subcommittee of either House or any joint committee of Congress. The bill also would have provided standing for the appropriate plaintiffs and allowed them to prosecute their actions by the attorneys of their choice (as does the present statute respecting the Select Committee).

The bill was accompanied by oral and written statements by Senator Ervin (Tab A). Senator Ervin made clear that the statute, despite its broad scope, was introduced in response to Judge Sirica's ruling of October 17, 1973, that dismissed this suit for lack of jurisdiction. He emphasized that a civil remedy to resolve

Judge Gerhard A. Gesell

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January 9, 1974

the controversy was needed because it would not be appropriate to initiate criminal contempt proceedings or use the Senate's self-help procedures against the President. At Senator Ervin's request, the bill was placed on the calendar for consideration on Tuesday, November 6.

S. Res. 194 was also accompanied by oral and written statements by Senator Ervin (Tab A). It is apparent from his statements--as from the text of the resolution--that its purpose was to aid in resolving certain issues raised in this law suit, i.e., the scope of the Committee's authority to subpoena and sue the President and investigate wrongdoing in the executive branch. The resolution was also placed on the calendar for consideration on Tuesday, November 6.

The resolution was actually called up for consideration on Wednesday, November 7 (see Tab C). Upon its reading, it was unanimously passed by the Senate.

S. 2641 was introduced in the House on November 8, 1973, by Congressman Preyer and others. The bill was immediately referred to the House Committee on the Judiciary (Tab D).

On November 9, a "substitute amendment" to S. 2641, which later became P.L. 93-190, was introduced by Senator Ervin in the Senate (see Tab E). The substitute amendment, which, of course, was limited to suits brought by the Select Committee, passed the Senate that same day. The new bill was substituted by Senator Ervin on the suggestion of Senator Bruska, who viewed the initial bill as overbroad. Bruska, however, opposed even the substitute amendment, claiming that it would cast the judicial branch "in the role of umpire or referee between Congress and the executive in disputes over the production of documents and evidence". S. 20131. Senator Bruska did express his view that narrowing the bill to deal with the unique controversy presented by the Select Committee's subpoenas was a "prudent step". S. 20131.

In several respects, the bill as passed is broader than the original bill. Most importantly, it provides that the District Court "shall have jurisdiction to enter any such judgment or decree in any such civil action as may be necessary or appropriate to enforce obedience to any . . . subpoena" issued by the Committee.

The Senate substitute amendment was considered and passed by the House on December 3 (Tab F), after having been presented by Congressman Kastermeier. The substitute amendment had previously been reported out of the House Committee on the Judiciary without dissent on November 26 (Tab G). On the floor Congressman Railsback recognized that provision for a civil remedy was necessary because other methods of enforcing a subpoena against the President would be "unseemly". H. 10485. Mr. Kastermeier on the floor and the Judiciary Committee Report both stated that the bill "will leave unresolved any issue of justiciability". This is, of course, correct,

Judge Gerhard A. Gesell

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January 9, 1974

for only this Court can determine if this controversy is justiciable. But this statute, which provides that the Court has jurisdiction "to enter any . . . judgment or decree . . . necessary or appropriate to enforce obedience to any [Committee] subpoena" does serve as a congressional expression of opinion that this controversy is judiciable, especially when juxtaposed with the President's contention that the case is not justiciable because he is immune from Court process. It is plain from the statements of the bill's supporters--Ervin, Kastenmeier, Rallsback, Rodino--and its opponents--Hruska, McClory, Brooks--that they all recognized that implicit in the bill's passage was the view that this Court should decide the present controversy.

Also significant is the remark of Congressman Rodino who, in support of the bill, observed that "conclusion of the Watergate investigation is critical to the restoration of our people's confidence in the Federal Government". H. 10486. This statement is but another affirmation of the importance of Congress' "informing function", a subject dealt with in depth in our memorandum.

Sincerely yours,

Senate Select Committee on  
Presidential Campaign Activities

Attorney for Plaintiffs

JH:slk  
Enclosures

cc: J. Fred Buzhardt (w/enc.)



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to me that even those who would admit begrudgingly that this is the kind of man we ought to have, would say that we should get on with the job.

Mr. LONG. I would hope so.

# SENATE RESOLUTION 194—SUBMISSION OF A RESOLUTION RELATING TO SENATE RESOLUTION 60

(Ordered to be placed on the calendar.)

Mr. ERVIN. Mr. President, I send to the desk a resolution and ask for its immediate consideration. I do this in behalf of all the members of the Senate Select Committee on Presidential Campaign Activities.

The assistant legislative clerk read the resolution by title.

The resolution (S. Res. 194) is as follows:

Resolved That,  
SECTION 1. By S. Res. 60, 93d Cong., 1st Sess. (1973), Sec. 3(a)(5), the Select Committee on Presidential Campaign Activities was and is empowered to issue subpoenas for documents, tapes and other materials to any officer of the executive branch of the United States Government. In view of the fact that the President of the United States is, as recognized by S. Res. 60, an officer of the United States, and was a candidate for the office of President in 1972 and is therefore a person whose activities the Select Committee is authorized by S. Res. 60 to investigate, it is the sense of the Senate that the Select Committee's issuance on July 23, 1973, of two subpoenas *duces tecum* to the President for the production of tapes and other materials was and is fully authorized by S. Res. 60. Moreover, the Senate hereby approves and ratifies the Committee's issuance of these subpoenas.

Sec. 2. On August 9, 1973, the Select Committee and its members instituted suit against the President of the United States in the United States District Court for the District of Columbia to achieve compliance with the two subpoenas referenced in Section 1 above, and since that time, in both the District Court and the United States Court of Appeals for the District of Columbia Circuit, have actively pursued this litigation. It is the sense of the Senate that the initiation and pursuit of this litigation by the Select Committee and its members was and is fully authorized by applicable custom and law, including the provisions of S. Res. 262, 70th Cong., 1st Sess. (1928). In view of the entirely discretionary provisions of Section 3(a)(6) of S. Res. 60, it is further the sense of the Senate that the initiation of this lawsuit did not require the prior approval of the Senate. Moreover, the Senate hereby approves and ratifies the actions of the Select Committee in instituting and pursuing the aforesaid litigation.

Sec. 3. The Select Committee and its members, by issuing subpoenas to the President and instituting and pursuing litigation to achieve compliance with those subpoenas, were and are acting to determine the extent of possible legal, improper or unethical conduct in connection with the presidential campaign and election of 1972 by officers or employees of the executive branch of the United States Government or other persons. It is the sense of the Senate that, in so doing, the Select Committee and its members were and are engaged in the furtherance of valid legislative purposes, to wit, a determination of the need for and scope of corrective legislation to safeguard the processes by which the President of the United States is elected and, in that connection, the informing of the public of the extent of il-

legal, improper or unethical activity that occurred in connection with the presidential campaign and election of 1972 and the involvement of officers or employees of the executive branch or others therein. It is further the sense of the Senate that the materials sought by the Committee's subpoenas are of vital importance in determining the extent of such involvement and in determining the need for and scope of corrective legislation.

THE PRESIDING OFFICER. Is there objection to the unanimous-consent request?

Mr. GRIFFIN. I would have to reserve the right to object because I do not know what the resolution is or its fundamental purpose.

Mr. ERVIN. Mr. President, the resolution is to make it plain that the Senate Select Committee in bringing a suit in the District Court of the United States to require access to certain specified tapes is acting in behalf of the Senate.

Mr. GRIFFIN. May I inquire of the distinguished Senator from North Carolina, does he really expect the matter to be considered and voted on this morning, or is it acceptable to the Senator—

Mr. ERVIN. I would ask unanimous consent that the resolution be placed upon the calendar, and that it be called up Tuesday morning, if that does not interfere with the program.

Mr. GRIFFIN. I suppose it would be called up in the normal course at that time, would it not, if we could have it called up under the same circumstances. The Senate is not coming in on Tuesday, necessarily.

Mr. ROBERT C. BYRD. Mr. President, I was going to reserve the right to object simply to state that it is not certain that the Senate will be in on Tuesday. The Senate will come in on Monday.

Mr. ERVIN. There may be some objection to considering it Monday. I ask unanimous consent—

Mr. GRIFFIN. But to have it go on the calendar—

Mr. ERVIN. I ask unanimous consent that the resolution be placed upon the calendar, and that it not be called up before Tuesday morning.

THE PRESIDING OFFICER. Is there objection?

Mr. GRIFFIN. Mr. President, I shall not object to that. I realize that many of my colleagues, perhaps, will think that this matter should go to a committee, and we should have some hearings on it, and that would be a preferable way to legislate. But, on the other hand, the Senator from North Carolina, under the parliamentary situation, is clearly able, through this procedure, to ask unanimous consent for immediate consideration to get it to the calendar without it going to a committee, and if he wants to take that route he is certainly within his rights, and the only thing we are doing here by unanimous consent is to avoid the parliamentary steps that would be necessary.

THE PRESIDING OFFICER. Without objection, it is so ordered.

Mr. ERVIN. I make this request because time is of the essence. A suit that this resolution might possibly affect is now pending, and may come up any day in the circuit court.

I ask unanimous consent to have printed in the RECORD a statement prepared by me explaining the nature and purpose of the resolution, for the information of the Senate.

THE PRESIDING OFFICER. Without objection, it is so ordered.

## STATEMENT OF SENATOR ERVIN

The Resolution before the Senate is intended to aid in resolving certain questions that have been raised concerning the Select Committee's actions.

It states that it is the sense of the Senate that the Committee, under S. Res. 60, had and has authority to subpoena the President, who is an "officer" of the United States amenable to subpoena under Sec. 3(a)(5) of S. Res. 60, to obtain certain information relating to possible improper, illegal, or unethical conduct in connection with his candidacy for the Presidency in 1972. It further states that the Senate approves and ratifies the Committee's action in regard to its subpoenas.

It states it is the sense of the Senate that the Committee and its members were and are fully empowered by applicable custom and law, including S. Res. 262, 70th Cong., 1st Sess. (1928), to sue to enforce the Committee's subpoenas and that the Senate approve and ratifies the initiation and prosecution of this litigation.

Finally, it states that it is the sense of the Senate that the Committee and its members, in subpoenaing and bringing a civil action to enforce its subpoenas, were and are acting in furtherance of valid legislative purposes—a determination of the need for and scope of corrective legislation relating to presidential campaigns and, in that regard, the revelation to the public of the extent of corruption in the 1972 presidential campaign and election. It also states that it is the sense of the Senate that the information sought is vital to the performance of the Committee's functions.

The members of the Committee are fully convinced that they have complete authority to pursue the activities referred to in this Resolution, and are acting in this request with valid legislative purposes. The Resolution, however, removes all doubts.

## INTRODUCTION OF S. 2641, A BILL TO CONFER JURISDICTION UPON THE DISTRICT COURTS OVER CERTAIN CIVIL ACTIONS BROUGHT BY CONGRESS

Mr. ERVIN. I send forward a bill and ask for its immediate consideration. I might state that this bill is introduced in behalf of every member of the Senate Select Committee on Presidential Campaign Activities.

THE PRESIDING OFFICER. The bill will be stated by title.

The assistant legislative clerk read as follows:

A bill (S. 2641) to confer jurisdiction upon the District Courts of the United States over certain civil actions brought by the Congress, and for other purposes.

Mr. ERVIN. The purpose of the bill is to make clear that the U.S. District Court for the District of Columbia will have jurisdiction of suits brought by authorized congressional committees to enforce subpoenas. The necessity for it is occasioned by the fact that Judge Sirica, under his ruling on the 17th of this month in a suit brought by the select committee at the instance of all the members of the select committee to enforce subpoenas which we had issued to

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the President calling for the production of tapes for September 15, 1972; February 28, 1973; March 13, 1973; and March 21, 1973, held that the District Court of the District of Columbia had no jurisdiction to pass upon the merits or demerits of the subpoena, and he pointed out the fact that the committee had not pursued either of the two remedies that would ordinarily have been available in this connection. One of these remedies is to seek to prosecute in the criminal courts of the district for contempt of the Senate the person who refused to obey the subpoena.

Manifestly, the committee did not think it would be appropriate to try to prosecute the President of the United States in the courts for contempt of the Senate, and therefore did not make a recommendation to that effect. The other available remedy is to seek to bring before the Senate itself for punishment the offending party.

We did not think that this would be an appropriate remedy.

The purpose of this bill is to make clear that the District Court of the District of Columbia shall have jurisdiction of a civil action to enforce a subpoena directed to the President, the Vice President, or any other officer of the Federal Government, by a congressional committee where the committee is seeking to obtain information which is relevant to an investigation the committee is authorized to make.

I sincerely hope that when this matter is considered on its merits, every Member of the Senate and every Member of the Congress who thinks it is time for the Congress of the United States to quit playing second fiddle to the White House will support this bill.

I ask unanimous consent that the bill be placed upon the calendar, and that it not be called up for consideration prior to Tuesday of next week.

**THE PRESIDING OFFICER (Mr. KENNEDY).** Is there objection to the bill being placed on the calendar, and not considered before Tuesday? The Chair hears none, and it is so ordered.

**MR. ERVIN.** Mr. President, I also ask unanimous consent to have printed in the RECORD a statement prepared by me explaining the nature and purpose of the bill, for the information of Senators.

**THE PRESIDING OFFICER.** Without objection, it is so ordered.

#### STATEMENT BY SENATOR ERVIN

The bill before the Senate responds to Judge Sirica's ruling on October 17 that the District Court has no jurisdiction to hear the Select Committee's suit seeking enforcement of its two subpoenas. The Committee believes that the Court has jurisdiction in its case and that the Committee would eventually prevail on appeal, but this bill removes any doubt that its suit is properly before the Court. This bill will also permit the Committee to resolve the jurisdictional issue more promptly than if the matter were left solely to litigation.

But the bill has a broader usefulness because it will allow suit against any officer or employee of the executive branch to test the validity of a Congressional subpoena. The bill provides a nonexclusive remedy. Other remedies available to the Congress to enforce its subpoenas are its implied self-help procedures and the statutory contempt power, but the

use of these processes may be inappropriate, unseemly, or nonexpedient where executive officers are involved. Moreover, a civil suit may be a quicker way of enforcing subpoenas than either of these other two processes. Use of self-help procedures and the statutory contempt power can result in a court determination of the validity of a Congressional subpoena, so there is nothing novel in turning over the question of validity to the courts.

The bill applies to suits seeking to enforce subpoenas for "information, documents and other materials." The tapes and documents the Committee seeks would be covered. The use of the phrase "information, documents and other materials" indicates that it is not necessary that the subpoenas seek evidence that would be admissible in a judicial proceeding. The bill is limited to subpoenas to officers and employees of the executive branch and does not apply to subpoenas to private individuals.

The bill is jurisdictional; it deals with the right of the District Court for the District of Columbia to hear suits to enforce subpoenas against executive officials and in no way touches on the merits of those suits.

"The term 'any committee' is used in the bill to demonstrate that it applies to select and special committees, as well as standing committees.

The bill also provides that the Houses and their Committees have standing to prosecute a suit of this type.

And the bill provides that the Houses and their committees may employ attorneys of their choice to prosecute their litigation, thus making plain that the provisions of 28 U.S.C. §§ 516-519, which provide that suits on behalf of the United States shall be brought and prosecuted by the Attorney General and his subordinates, are inapplicable to litigation initiated under this bill.

It is anticipated that this section will be seldom used. In most cases where the Congress seeks information from the executive branch, any dispute can be resolved by the normal process of political accommodation.

**MR. GRIFFIN.** Mr. President, I merely want to add, following that last unanimous-consent agreement, that the same explanation in terms of the responsibility of the leaderships on this side would apply to the bill as to the resolution which the Senator from North Carolina offered earlier.

I see no particular reason for having him present it and have it objected to today, and then come back in on Monday, which he could do, have it offered, and then have it objected to again, in which case it would go on the calendar automatically under our rules.

He has asked unanimous consent to bypass those procedural steps and have it go right to the calendar rather than to committee, and it seems to me that the rights of Senators are protected to the same degree as they would be otherwise.

**MR. ERVIN.** I thank the Senator from Michigan.

I would point out that he has reserved, on behalf of any Member of the Senate, the right to make a motion; to refer the resolution or the bill when a motion to call up either of them is made.

**MR. GRIFFIN.** I thank the Senator.

#### TRANSACTION OF ROUTINE MORNING BUSINESS

**THE PRESIDING OFFICER (Mr. KENNEDY).** Under the previous order,

there will now be a period for the transaction of routine morning business of not to exceed 30 minutes, with statements therein limited to 3 minutes.

#### QUORUM CALL

**MR. ROBERT C. BYRD.** Mr. President, I suggest the absence of a quorum.

**THE PRESIDING OFFICER (Mr. KENNEDY).** The clerk will call the roll. The legislative clerk proceeded to call the roll.

**MR. ERVIN.** Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

**THE PRESIDING OFFICER (Mr. NUNN).** Without objection, it is so ordered.

#### APPOINTMENT OF A SPECIAL PROSECUTOR

**MR. ERVIN.** Mr. President, when the nomination of Elliot Richardson to be Attorney General of the United States came up before the Committee on the Judiciary, Mr. Richardson made a specific agreement with the Senate Judiciary Committee. As I understand it, Mr. Richardson assured the Judiciary Committee that he had been authorized by the President to appoint a special prosecutor to have charge of the prosecution of criminal actions arising out of that unhappy series of events known collectively as the Watergate affair. As I understand it, Mr. Richardson's agreement with the committee pledged that the special prosecutor would not be discharged except for gross improprieties.

Pursuant to that agreement, Mr. Richardson was confirmed as Attorney General of the United States. He appointed Archibald Cox, an outstanding teacher of law, who had served with rare distinction as Solicitor General of the United States, to act as special prosecutor.

From such information as I have on the subject, Mr. Cox was summarily discharged, not for gross improprieties, but simply because he undertook to perform his duty as special prosecutor in a courageous and intelligent manner.

I have grave misgivings about taking any power out of the hands of the executive department of Government, but there is an old proverb which says, "If you fool me one time, it is your fault, but if you fool me the second time, it is mine."

Now, we are assured that Mr. Jaworski, who is a most eminent lawyer and a fine gentleman, will have independence. We were given the same assurance in respect to Mr. Cox. No special prosecutor can truly enjoy independence in the discharge of his duties if he is subject to removal by either the Department of Justice or the White House.

I am not concerned by the argument that an effort to obtain congressional action to insure the independence of a special prosecutor will delay matters.

The Department of Justice has had jurisdiction of the Watergate affair since the morning of the 17th of June 1972. During that time, justice has been traveling on leaden feet.

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1st SESSION

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(Note.—Fill in all blank lines except those provided for the date, number, and reference of bill.)

## IN THE SENATE OF THE UNITED STATES

B

Mr. ERVIN of North Carolina

introduced the following bill; which was read twice and referred to the Committee on

## A BILL

To confer jurisdiction upon the District Courts of the United States over certain civil actions brought by the Congress, and for other purposes.

(Insert title of bill here)

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* that (a) Chapter 85 of Title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 1364. Congressional actions.

"(a) The District Court for the District of Columbia shall have original jurisdiction, without regard to the sum or value of the matter in controversy, over any civil action brought by either House of Congress, any Committee of such House, or any Joint Committee of Congress, to enforce or secure a declaration concerning the validity of any subpoena or order issued by such House or Committee, or by any Subcommittee of such Committee, to any officer, including the President and Vice-President, or any employee of the executive branch of the United States Government to secure the production of information, documents, or other materials.

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"(b) Either House of Congress, any Committee of such House authorized by such House to bring suit, or any Joint Committee of Congress authorized by Congress to bring suit, in addition to any other available remedies, may commence and prosecute a civil action under subsection (a) in its own name or in the name of the United States in the District Court for the District of Columbia to enforce or secure a declaration concerning the validity of any subpoena or order issued by such House or Committee, or by any Subcommittee of such Committee, against any officer, including the President and Vice-President, or any employee of the executive branch of the United States Government to secure the production of information, documents, or other materials.

"(c) Any House or Committee commencing or prosecuting an action pursuant to this section may be represented in such action by such attorneys as it may designate."

(b) The analysis of such chapter 85 is amended by adding at the end thereof the following new term:

"1364. Congressional actions."

now they're creating a shortage." B & W already has sold out most of the 1,000 cords of seasoned firewood it had set aside for this winter.

Some firewood dealers already are sold out, such as the F. L. Watkins Co. of Seat Pleasant, Md., which has been handling firewood here for almost 60 years. "We were sold out weeks ago and now I can't get any," said owner Fred Watkins.

"There's no real shortage, but everybody's been scared to death by stories about a fuel shortage. . . . In fact they've not only bought up all my wood but bought every stove in the store and almost all the bags of coal," Watkins said.

One of the area's largest store dealers, Acme Store Co., said yesterday it has sold virtually every wood store it has "Franklin stoves, pot-bellied stoves, wood stoves, wood heaters, you name it" and that the foundries that make them are now three months to more than year oversold.

Many of the stove sales came before threats of a fuel crisis, Acme says, and are due largely to the increase in rural second homes where primitive cast iron fireplaces and stoves are in demand.

The impact here of a winter shortage of home heating oil and gas expected nationwide is unclear and will depend largely upon the weather, according to oil companies and the Washington Gas Light Co.

Most Washington-area homes are heated by gas, the rest by oil and electricity. Local appliance stores and department stores such as Hecht's said yesterday there has been a noticeable increase in sales of small electric space and baseboard heaters in the past month, but no stores reported shortages.

Most of the two dozen firewood companies listed in the yellow pages of the telephone book said they are turning down orders for wood, are simply out of it, or have wood but predict delays of several weeks in deliveries. White Oak Tree Service of Silver Spring tells callers it cannot make deliveries January.

Most wood dealers say the problem is that it takes several months to a year to season-dry out—wood so that it will burn well, and dealers did not anticipate a run on firewood this fall.

While there is an apparent shortage of seasoned firewood, there is still green wood available at many wood dealers.

Many firms are now recommending mixing green and seasoned wood, partly perhaps because stocks of seasoned wood are running low.

Under both Virginia and Maryland law (but not in the District), firewood must be sold by the cord or an exact portion of a cord, and use of woods like "face cord" is illegal. A cord is a stack of two-foot logs four feet high and 16 feet long, totaling 128 cubic feet of wood.

#### LET US CLEAN UP THE STREETS OF THE DISTRICT OF COLUMBIA

Mr. HUMPHREY. Mr. President, may I suggest that the District of Columbia get busy and clean up its streets around here. The Nation's Capital looks like a garbage heap. It is time someone did something about it. This is a great Nation's Capital. As a former mayor of a great city I know that the streets can be kept clean and that we do not have to leave trash piled up in the streets.

It is about time that someone spoke up in the Senate about this matter. We appropriate the money for the District of Columbia here in Congress. I am a taxpayer. All the people of America are taxpayers for the District of Columbia. It is about time that this city was made to look like it should; namely, a shining

example of modern urban America. Instead, it is being permitted to deteriorate.

Mr. President, I am going to keep talking about this subject until someone gets on the ball. There is no reason whatsoever to have the streets of this city look like a garbage dump for the entire eastern coastline.

It is time to get busy, go to work, and get the job done.

If the District of Columbia does not have the funds to do it, then they should come up here to us and ask for it and see if we can give them some help.

When I go down M Street, or South Capitol or North Capitol Streets and see the littered streets, it tells me that someone is not doing his job.

I hope that someone in the District of Columbia will read what I have said today. I am sending them a letter, anyway. As a matter of fact, I write to them quite often but I am not sure they get the mail. But I shall continue to write and I shall continue to speak out, because when people come to this great city they should see something else besides expensive Government buildings. They should be looking at a community which is proud of itself.

I shall ask the press to do what they do elsewhere, to get the people of a community to do something to make their city the beautiful city it should be.

#### SENATE RESOLUTION 194, RELATING TO SENATE RESOLUTION 60—CERTAIN SUITS INSTITUTED BY THE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES

Mr. ERVIN. Mr. President, with the consent of the majority leadership, and without objection on the part of the minority leadership, I ask unanimous consent that the Senate proceed to the consideration of Calendar No. 454, Senate Resolution 194, and that it be called up for immediate consideration.

The PRESIDING OFFICER (Mr. McGovern). The resolution will be stated by title.

The legislative clerk read as follows:

S. Res. 194, relating to S. Res. 60.

The PRESIDING OFFICER. Is there objection to the present consideration of the resolution?

There being no objection, the Senate proceeded to consider the resolution.

Mr. ERVIN. Mr. President, this is a simple Senate resolution which, in effect, states that the Senate Select Committee on Presidential Campaign Activities in the issuance of subpoenas for certain documents was acting within the scope of the provisions as authorized by Senate Resolution 60 and ratified the action given in issuing the subpoenas and also in bringing suit in district court for the enforcement of subpoenas.

Mr. President, the resolution before the Senate is intended to aid in resolving certain questions that have been raised concerning the select committee's actions.

It states that it is the sense of the Senate that the committee, under Senate Resolution 60, had and has authority to subpoena the President, who is an "officer" of the United States amenable to

subpoena under section 3(a) (5) of Senate Resolution 60, to obtain certain information relating to possible improper, illegal, or unethical conduct in connection with his candidacy for the Presidency in 1972. It further states that the Senate approves and ratifies the committee's action in regard to its subpoenas.

It states it is the sense of the Senate that the committee and its members were and are fully empowered by applicable custom and law, including Senate Resolution 263, 70th Congress, first session (1928), to sue to enforce the committee's subpoenas and that the Senate approves and ratifies the initiation and prosecution of this litigation.

Finally, it states that it is the sense of the Senate that the committee and its members, in subpoenaing and bringing a civil action to enforce its subpoenas, were and are acting in furtherance of valid legislative purposes—a determination of the need for and scope of corrective legislation relating to Presidential campaigns and, in that regard, the revelation to the public of the extent of corruption in the 1972 Presidential campaign and election. It also states that it is the sense of the Senate that the information sought is vital to the performance of the committee's functions.

The members of the committee are fully confident that they have complete authority to pursue the activities referred to in this resolution, and are acting in this request with valid legislative purposes. The resolution, however, removes all doubts.

The resolution was agreed to, as follows:

S. Res. 194

Resolution relating to S. Res. 60

Resolved, That—

SECTION 1. By S. Res. 60, Ninety-third Congress, first session (1973), section 3(a) (5), the Select Committee on Presidential Campaign Activities was and is empowered to issue subpoenas for documents, tapes and other materials to any officer of the executive branch of the United States Government. In view of the fact that the President of the United States is, as recognized by S. Res. 60, an officer of the United States, and was a candidate for the office of President in 1972 and is therefore a person whose activities the select committee is authorized by S. Res. 60 to investigate, it is the sense of the Senate that the select committee's issuance on July 23, 1973, of two subpoenas duces tecum to the President for the production of tapes and other materials was and is fully authorized by S. Res. 60. Moreover, the Senate hereby approves and ratifies the committee's issuance of these subpoenas.

SEC. 2. On August 9, 1973, the select committee and its members instituted suit against the President of the United States in the United States District Court for the District of Columbia to achieve compliance with the two subpoenas referenced in section 1 above, and since that time, in both the district court and the United States Court of Appeals for the District of Columbia Circuit, have actively pursued this litigation. It is the sense of the Senate that the initiation and pursuit of this litigation by the select committee and its members was and is fully authorized by applicable custom and law, including the provisions of S. Res. 262, Seventieth Congress, first session (1928). In view of the entirely discretionary provisions of section 3(a) (6) of S. Res. 60, it is further the sense of the Senate that the initiation of this lawsuit did not require the prior ap-

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proval of the Senate. Moreover, the Senate hereby approves and ratifies the actions of the select committee in instituting and pursuing the aforesaid litigation.

Sec. 3. The select committee and its members, by issuing subpoenas to the President and instituting and pursuing litigation to achieve compliance with those subpoenas, were and are acting to determine the extent of possible illegal, improper, or unethical conduct in connection with the Presidential campaign and election of 1972 by officers or employees of the executive branch of the United States Government or other persons. It is the sense of the Senate that, in so doing, the select committee and its members were and are engaged in the furtherance of valid legislative purposes, to wit, a determination of the need for and scope of corrective legislation to safeguard the processes by which the President of the United States is elected, and, in that connection, the informing of the public of the extent of illegal, improper, or unethical activities that occurred in connection with the Presidential campaign and election of 1972 and the involvement of officers or employees of the executive branch or others therein. It is further the sense of the Senate that the materials sought by the committee's subpoenas are of vital importance in determining the extent of such involvement and in determining the need for and scope of corrective legislation.

Mr. ERVIN. Mr. President, I move that the vote by which the resolution was agreed to be reconsidered.

Mr. ROBERT C. BYRD. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. ERVIN. Mr. President, I want to thank the majority and minority leaderships for permitting me to bring up this resolution at this time.

The PRESIDING OFFICER (Mr. McGovern). What is the pleasure of the Senator?

Mr. MANSFIELD. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. HARRY F. BYRD, JR. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

#### ONE HUNDRED AND FIFTIETH ANNIVERSARY OF THE VIRGINIA THEOLOGICAL SEMINARY

Mr. HARRY F. BYRD, JR. Mr. President, today I invite the attention of the Senate of the United States to an important event which took place in Alexandria, Va., the evening of Thursday, November 1, 1973.

The occasion was the 150th anniversary of the Virginia Theological Seminary. Legally known as the Protestant Episcopal Theological Seminary in Virginia, the seminary was founded and opened its doors in Alexandria in October of 1823.

But at that time it was not Alexandria, Va.; it was Alexandria, District of Columbia.

Alexandria lay within a portion of the State of Virginia, which from 1798 to 1846, was allocated to the Federal Government for the Capital of the Nation.

The first class at the Virginia Seminary consisted of one student, George A. Smith, but by 1826 the student body had increased twentyfold.

Today the Virginia Seminary is the largest of the Episcopal seminaries.

Indeed, it is now educating 20 percent of all the young people studying for the Episcopal ministry throughout the country. It has a student body of approximately 200 persons, from 50 dioceses. More than two-thirds are married; more than half have seen military service. Ten percent are women.

I met and talked with many of them. They impressed me well.

On the evening of November 1, 1973, All Saints Day, a commemorative ceremony was held at the Virginia Seminary—a service and communion and then a dinner.

Present were many Members of the Congress. Presiding at the dinner was the Honorable Armitstead Boothe, of Alexandria. Mr. Boothe has had a distinguished career as a lawyer and as a member of the Virginia Legislature. He is now devoting his time and talents to the development of the Virginia Seminary.

The sermon at the Congress night service, held in the Virginia Seminary chapel, was delivered by the Right Reverend Robert F. Gibson, Jr. of Virginia.

Bishop Gibson pointed out that Seminary Hill and the Capitol of the United States across the river, long have lived in each other's shadow. He mentioned, too, that the parish had as its members both George Washington and Robert E. Lee.

The senior Senator from Virginia had the privilege of being present last week at the commemorative service and the dinner which followed.

I was much impressed with Bishop Gibson's sermon. I feel it should be shared with my colleagues in the Congress.

I ask unanimous consent that this sermon by Bishop Gibson, delivered on the historic occasion of the 150th anniversary of the Virginia Seminary, be printed at this point in the Record.

There being no objection, the sermon was ordered to be printed in the Record, as follows:

#### ALL SAINTS DAY—SEMINARY SESQUICENTENNIAL

It is my privilege to welcome and recognize, with respect and gladness, our distinguished guests from the Congress present for this special occasion.

And I cannot refrain from mentioning one in particular, the Vice President-designate, Gerald Ford. For this place of worship is also the parish church to which he belongs. So our ties are close.

I might also add that this geographical parish had as its members both George Washington and Robert E. Lee. Indeed, in the communion of the saints, we might say still has them as members, which is an interesting juxtaposition of past, present and future.

This Holy Hill, as we call it, and the Capitol across the river, have long lived in each other's shadow, and the relations of Seminary and Congress have often been close. With full respect for the proper separation of Church and State, I would pray that our goals be mutual and that our ties be

strengthened in common purpose in the days ahead.

Long ago when the Virginia Seminary opened its doors of learning in 1823, James Monroe, was President, John Adams and Thomas Jefferson were still alive, and, it seems worth noting, had reached peace and friendship after years of philosophical differences and political enmity.

The Seminary from its founding had a vision and purpose of mission. Its graduates went out to all parts of this country, and also to the uttermost parts of the world. Since long before Congress had the dreadful responsibility of governing a world power, it has been true that the sun has never set on the work of the Virginia Seminary.

All this seems worth recalling when we are gathered together on All Saints Day as a fitting part of the Sesqui-Centennial of the Seminary. We celebrate 150 years of service to our Church and country and world. All Saints Day, I think, is especially appropriate, not because of its date, but because of its message, a double-edged word of significance—this day of crisis at home and abroad. All Saints Day always bids us to look backward into history in grateful remembrance so that we may be strengthened to look forward to our purpose and goal as Christians—inspiring Americans, if we are faithful to our heritage.

Listen to the Church's message (Proper Preface): "We give thanks to thee, O Lord . . . who, in the multitude of thy Saints, has compassed us about with the great cloud of witnesses that we, rejoicing in their fellowship, may run with patience the race that is set before us."

This is to say, remember your forefathers—certainly including the faithful, the saints, of this Seminary and of the United States Congress—remember them, that in their fellowship, their witness, we may be strengthened and guided to go forward today.

Or, again, in that apocalyptic vision just read to us as the Epistle: "After this I beheld . . . a great multitude, which no man could number, of all nations, and kindreds, and people, and tongues. . . . What are these . . . and whence came they? . . . These are they which came out of great tribulation, and have washed their robes and made them white in the blood of the Lamb. . . . They shall hunger no more, neither thirst any more. . . . For the Lamb which is in the midst of the throne shall feed them, and shall lead them to living fountains of waters; and God shall wipe away all tears from their eyes."

Remember and hope and, by the grace of the Lord, serve your day. That is the All Saints Day message.

We need it. We need it precisely because neither history nor apocalyptic are popular among us today. And without them service can be, and often is, misguided, empty and unfulfilled. Remember and hope in order to serve.

We need it because the lack of observance of such a day as this is itself a commentary on our inadequate use of history and scripture as faithful Christians. This country knew that yesterday was Halloween, a day which somewhat symbolizes our confusion and the presence of wild spirits among us. But how many of us gave a second thought to All Saints Day and its symbol? I doubt that many of us, laity or clergy, would be attending church services tonight except for this special occasion and invitation. Somehow in our supposedly "relevant" lives our "holidays" are no longer "holy days" of faithful remembrance and hope.

Perhaps we cannot, or even should not, restore the "holy days" which developed in a more consciously Christian culture, and in a time less pressed by the perplexities and dangers of our life. But all days are holy days to those who know and would serve

November 7, 1972

## CONGRESSIONAL RECORD—HOUSE

H 9713

By Mr. FISKE:

H.R. 11330. A bill to establish an independent Special Prosecution Office, as an independent agency of the United States; and for other purposes; to the Committee on the Judiciary.

By Mr. FRASER:

H.R. 11331. A bill to terminate the Airlines Mutual Aid Agreement; to the Committee on Interstate and Foreign Commerce.

By Mr. HASTINGS:

H.R. 11332. A bill to repeal the act of January 5, 1927, relating to jurisdiction over the taking of fish and game within certain Indian reservations; to the Committee on Interior and Insular Affairs.

By Mr. ULLMANN:

H.R. 11333. A bill to provide a 7-percent increase in social security benefits beginning with March 1974 and an additional 4-percent increase beginning with June 1974, to provide increases in supplemental security income benefits, and for other purposes; to the Committee on Ways and Means.

By Mr. LUJAN:

H.R. 11334. A bill to provide for the establishment of an American Folk Life Center in the Library of Congress; and for other purposes; to the Committee on House Administration.

H.R. 11335. A bill to amend the Securities Exchange Act of 1934 to restrict persons who are not citizens of the United States from acquiring more than 5 percent of the nonvoting securities or more than 5 percent of the voting securities of any issuer whose securities are registered under such act, and for other purposes; to the Committee on Interstate and Foreign Commerce.

H.R. 11336. A bill to prohibit without congressional approval expenditures of appropriated funds with respect to private property used as residences by individuals whom the Secret Service is authorized to protect; to the Committee on Public Works.

By Mr. PREYER (for himself, Mr. AZUO, Mr. ALEXANDER, Mr. BROWN of California, Mrs. COLLINS of Illinois, Mr. FASCELL, Mr. FORSYTHE, Mr. FOUNTAIN, Mr. HARRINGTON, Mr. KYROS, Mr. MCCORMACK, Mr. MANN, Mr. MOAKLEY, Mr. MOLLOHAN, Mr. MOSS, Mr. MURPHY of New York, Mr. O'HARA, Mr. PEPPER, Mr. REES, Mr. ROY, Mrs. SCHROEDER, Mr. TAYLOR of North Carolina, Mr. TIERMAN, and Mr. WALDE):

H.R. 11337. A bill to confer jurisdiction upon the district courts of the United States

over certain civil actions brought by the Congress, and for other purposes; to the Committee on the Judiciary.

By Mr. SMITH of Iowa (for himself, Mr. ANDREWS of North Carolina, Mr. CULVER, Mr. DANIELSON, Mr. NIX, Mr. PEPPER, Mr. PICKLE, Mr. ROBINSON of Virginia, Mr. ROSS, Mr. ROSENTHAL, Mr. ROY, Mr. SCHERER, Mr. SIKES, Mr. SLACK, Mrs. SULLIVAN, Mr. THOMPSON of New Jersey, Mr. TIERMAN, Mr. UDALL, Mr. ULLMANN, and Mr. WALDE):

H.R. 11338. A bill to amend the Commodity Exchange Act to strengthen the regulation of futures trading, to require public disclosure of certain information relating to sales of commodities, to bring all agricultural and other commodities traded on exchanges under regulation, and for other purposes; to the Committee on Agriculture.

By Mr. SYKES:

H.R. 11339. A bill to amend the Federal Food, Drug, and Cosmetic Act to require that patients may not be treated with investigational new drugs without their consent, and for other purposes; to the Committee on Interstate and Foreign Commerce.

By Mr. ARCHER (for himself, Mr. ARMSTRONG, Mr. BURKE of Florida, Mr. EDWARDS of California, Mr. FAY, Mr. HASTINGS, Mr. HENK, Mr. HODGINS, Mr. KETCHUM, Mr. LEAHY, Mr. LOFT, Mr. LUJAN, Mr. MCCOLLISTER, Mr. McDADD, Mr. MCKINNEY, Mr. MARTIN of North Carolina, Mr. MINSHALL of Ohio, Mr. MONTGOMERY, Mr. PEPPER, Mr. REGULA, Mr. ROBINSON of Virginia, Mr. ROSS, Mr. SHOUF, Mr. YATRON, and Mr. YOUNG of South Carolina):

H.J. Res. 813. Joint resolution to express the sense of Congress that a White House Conference on the Handicapped be called by the President of the United States; to the Committee on Education and Labor.

By Mr. COLVER (for himself, Mr.

WHITE, Mr. STEELE, and Mr. HANNA):

H.J. Res. 814. Joint resolution to provide for the appointment of a special prosecutor, and for other purposes; to the Committee on the Judiciary.

By Mr. GILMAN:

H.J. Res. 815. Joint resolution to provide for the appointment of a Special Prosecutor to investigate and prosecute any offense arising out of campaign activities with respect to the election in 1972 for the Office of the President; to the Committee on the Judiciary.

By Mr. KEAP:

H.J. Res. 816. Joint resolution proposing an amendment to the Constitution of the United States to provide a limit, established in relation to national income, on Federal revenue and expenditures, and for other purposes; to the Committee on the Judiciary.

By Mr. LONG of Maryland:

H.J. Res. 817. Joint resolution to provide for the appointment of a Special Prosecutor, and for other purposes; to the Committee on the Judiciary.

By Mr. LONG of Maryland (for himself, Mr. HARRINGTON, Mr. REES, Mr. FRASER, Mr. UDALL, Mr. BROWN of California, and Mr. HELSTOSKI):

H. Con. Res. 378. Concurrent resolution expressing the sense of Congress that Richard M. Nixon should resign from the Office of President of the United States; to the Committee on the Judiciary.

By Mr. BYRON:

H. Res. 889. Resolution to seek peace in the Middle East and to continue to support Israel's deterrent strength through transfer of Phantom aircraft and other military supplies; to the Committee on Foreign Affairs.

## PRIVATE BILLS AND RESOLUTIONS

Under clause 1 of rule XXII, private bills and resolutions were introduced and severally referred as follows:

By Mr. BROVHILL of Virginia:

H.R. 11340. A bill for the relief of Mrs. Maritza Busch; to the Committee on the Judiciary.

By Mr. BURTIN:

H.R. 11341. A bill for the relief of James R. Oom, Jr.; to the Committee on the Judiciary.

By Mr. DRINAN:

H.R. 11342. A bill for the relief of Benjamin R. Lucardie; to the Committee on the Judiciary.

## PETITIONS, ETC.

Under clause 1 of rule XXII, petitions and papers were laid on the Clerk's desk and referred as follows:

350. By the SPEAKER: Petition of Yisrael Yeshayahu, Speaker of the Knesset, Tel Aviv, Israel, relative to treatment of prisoners of war by Egypt and Syria; to the Committee on Foreign Affairs.

351. Also, petition of James I. Dillard, St. Albans, N.Y., relative to redress of grievances; to the Committee on the Judiciary.

S 20130

## CONGRESSIONAL RECORD—SENATE

November 9, 1973

I feel it is important to show that whether we are regarded as liberals or conservatives, or whatever we are, we still back up our country, and others should not make the mistake of assuming that dislike for the President on the part of some would influence us to let any foreign element come in here and undertake to influence our people to the extent which apparently some are trying to do.

Mr. HUMPHREY. Mr. President, I thank the Senator from Vermont, the Senator from Michigan, and the Senator from Georgia for their comments. I am confident that what this resolution will do will be of substantial help in obtaining peace in a very troubled part of the world, at a time, may I say, when the entire world is deeply concerned over the constant threats, conflicts, and tension. Mr. President, this resolution is merely an effort to state once again that when the vital interests of our country are at stake and when a determined effort is being made to obtain a peaceful solution to grave international disputes, we in this body and elsewhere, without trying to rubber stamp anything, will put aside whatever partisanship we may have, and will even put aside our feelings on domestic concerns, and try to unite in common cause and common purpose.

Mr. President, I would hope that we might now move to favorable consideration.

Mr. GRIFFIN. Mr. President, will the Senator yield for the observation that this resolution helps to establish the spirit of Arthur Vandenberg which has not been repealed.

Mr. HUMPHREY. Yes, I thank the Senator.

Mr. HUGH SCOTT. Mr. President, I am pleased to join two of my distinguished colleagues (Mr. HUMPHREY and Mr. Aiken) on Friday in sponsoring this resolution relating to the national security of the United States. What it says to other nations is this: do not construe domestic events as adversely affecting our resolve to uphold the vital interests of the United States, especially in the Middle East. In that most troubled part of the world, the President of the United States, with the support of the Congress, has not only brought about a ceasefire, but has been able to build foundations for a lasting peace.

The Humphrey resolution should stand as a red light to those who feel that domestic unrest can be converted to a foreign policy defeat. I commend the Senator for his initiative in this regard.

Mr. BAKER. Mr. President, I wish to commend the distinguished senior Senator from Vermont and the distinguished junior Senator from Minnesota for offering one of the most timely sense of the Senate resolutions. I have seen in recent years.

That resolution serves notice to any and all potential adversaries of the United States that it would be the gravest sort of error to misinterpret the effect of our present domestic troubles on our ability to protect our vital national interests both at home and abroad.

The resilience and resolve of the American people is second to none, in my judgment; and the proposed resolution offered in the same spirit of bipartisanship evident during the near confrontation with the Soviet Union, is proof of that unique determination.

It should also be made clear that the United States will not shrink from its obligations to our allies nor abandon our efforts to bring a just and lasting peace to the Middle East, no matter what the cost.

There can be no more significant goal than protecting our national security interests whether at home or abroad, and I am pleased today to lend my enthusiastic support to a resolution which emphasizes the primacy of security over any and all domestic problems.

The ACTING PRESIDENT pro tempore. Is there objection to the present consideration of the resolution?

There being no objection, the resolution was considered and agreed to.

The preamble was agreed to.  
The resolution, with its preamble, reads as follows:

# RESOLUTION RELATING TO THE NATIONAL SECURITY OF THE UNITED STATES

Whereas the law of our nation requires the concurrence of the Congress in all decisions relating to the nation's vital national security interests; and

Whereas the recent uncertainties and divisions in the nation may cause adversaries and friends to doubt the bipartisan unity behind the pursuit of our national security objectives;

Whereas the ability of the U.S. government to effectively pursue its international objectives must not be impaired, particularly in time of crisis; and

Whereas recent international events have posed a grave threat to peace and stability; and

Whereas the U.S. is currently involved in serious negotiations affecting our vital national interests and the peace of the world: Now, therefore, be it

Resolved, that it is the sense of the Senate that other nations should not construe domestic events as adversely affecting our resolve to uphold these vital interests, nor be tempted to seize upon them as an opportunity to undermine the security of the United States;

Be it further resolved that it is the sense of the Senate that other nations should not construe domestic events as impairing the full commitment of our government to achieve a just and durable peace in the Middle East;

Be it further resolved that the Senate calls upon all friendly nations to join with the United States in pursuance of these vital common objectives, which have as their goal respect for law and a stable and secure peace throughout the world.

Mr. HUMPHREY. Mr. President, I move that the vote by which the resolution was agreed to be reconsidered.

Mr. NUNN. Mr. President, I move that the motion to reconsider be laid on the table.

The motion to lay on the table was agreed to.

Mr. HUMPHREY. Mr. President, I am very pleased and I want to thank the leadership for its cooperation as well as my colleagues.

This resolution will be open for further cosponsorship.

## ORDER OF BUSINESS

The ACTING PRESIDENT pro tempore. The Senator from Wyoming is recognized.

(The remarks Senator McGee made at this point on the introduction of S. 2673, dealing with the nomination of Senator Evans to be Attorney General, and the ensuing colloquy are printed in the RECORD under Statements on Introduced Bills and Joint Resolutions.)

## CONFERRING JURISDICTION UPON DISTRICT COURTS OF THE UNITED STATES OVER CERTAIN CIVIL ACTIONS BROUGHT BY CONGRESS

Mr. ERVIN. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of Calendar No. 455, S. 2641, which was placed on the calendar on November 2, 1973.

The ACTING PRESIDENT pro tempore. The bill will be stated by title. The assistant legislative clerk read as follows:

S. 2641, to confer jurisdiction upon the district courts of the United States over certain civil actions brought by the Congress, and for other purposes.

The ACTING PRESIDENT pro tempore. Is there objection to the present consideration of the bill?

There being no objection, the Senate proceeded to consider the bill.

Mr. ERVIN. Mr. President, I send forward a substitute amendment for the bill and ask that it be stated.

The ACTING PRESIDENT pro tempore. The substitute amendment will be stated.

The assistant legislative clerk proceeded to read the substitute amendment.

Mr. ERVIN. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER (Mr. Nunn). Without objection, it is so ordered, and the substitute amendment will be printed in the RECORD at this point.

The text of the substitute amendment is as follows:

"(a) The District Court of the United States for the District of Columbia shall have original jurisdiction, without regard to the sum or value of the matter in controversy, of any civil action heretofore or hereafter brought by the Senate Select Committee on Presidential Campaign Activities, which was created on February 7, 1973, by Senate Resolution No. 60, to enforce or secure a declaration concerning the validity of any subpoena or order heretofore or hereafter issued by said Committee to the President or the Vice President or any other officer of the United States or any other officer or employee of any department or agency of the United States to procure the production before the said Committee of any information, documents, taped recordings, or other materials relevant to matters the said Committee is authorized to investigate, and the said District Court shall have jurisdiction to enter any such judgment or decree in any such civil action as may be necessary or appropriate to enforce obedience to any such subpoena or order."



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"(b) The Senate Select Committee on Presidential Campaign Activities shall have authority to prosecute in its own name or in the name of the United States in the District Court of the United States for the District of Columbia any civil action heretofore or hereafter brought by said Committee to enforce or secure a declaration concerning the validity of any subpoena or order heretofore or hereafter issued by said Committee or Vice President or any other officer of the United States or any officer or employee of any department of the United States to procure the production before the said Committee of any information, documents, taped recordings, or other materials relevant to the matters the Committee is authorized to investigate, and pray the said District Court to enter such judgment or decree in said civil action as may be necessary or appropriate to enforce any such subpoena or order."

"(c) The Senate Select Committee on Presidential Campaign Activities may be represented by such attorneys as it may designate in any action prosecuted by said Committee under this Act."

Mr. ERVIN. Mr. President, I should like to state that I am introducing this substitute amendment with the approval of all members of the Senate Select Committee on Presidential Campaign Activities.

The original bill was rather broad, in that it attempted to give every congressional committee the power to bring suits.

At the suggestion of the distinguished Senator from Nebraska (Mr. Hruska), I decided that the original bill was too broad and I drew up this substitute amendment to conform to his suggestion; that is, that the bill be restricted to the Senate Select Committee on Presidential Campaign Activities. That is the purpose of the substitute amendment.

The amendment is necessary because Judge Sirica held that the District Court of the District of Columbia had no jurisdiction to entertain the original suit of the select committee. The substitute amendment is to cure this defect in jurisdiction.

Mr. HRUSKA. Mr. President, the bill in its original form was very broad and sought to establish a vast area of new Federal jurisdiction, the bill as amended would restrict its scope to the Senate Select Committee on Presidential campaign activities. I believe this to be a wise step.

Even as to the modified proposal, however, I suggest, Mr. President, that this kind of step flies in the face of the role of the courts in our constitutional system of Government, therefore, I would like to take this opportunity to offer some words of caution with respect to this bill which was introduced by my distinguished colleague from North Carolina (Mr. Ervin).

On October 17, 1973, Chief Judge John J. Sirica of the U.S. District Court for the District of Columbia ordered that the action commenced by the Select Committee on Presidential Campaign Activities to enforce its subpoenas directed to the President of the United States and requesting a turnover of certain tape recordings be dismissed with prejudice.

The basis of the court's dismissal of this action was a finding by the court that there was no jurisdictional statute upon which the action could be grounded. Because of its conclusions and disposi-

tion, the court did not reach the problem of justiciability or the merits of the case.

I have been advised that the intent of the sponsors of the subject bill as originally introduced is to grant only such jurisdiction as is needed to require a production of the tapes requested. It would seem, however, that the sponsors have gone far beyond their stated purpose and suggest a broad grant of jurisdiction to the U.S. District Court for the District of Columbia which could serve as a foundation for substantial litigation in this and other circumstances.

The proposed legislation as originally introduced would empower Congress or congressional committees to petition the District Court for the District of Columbia for enforcement of congressional subpoenas or orders requiring production of information, documents, or other materials which are in the custody of any officer or employee of the executive branch, including the President or Vice President. As I indicated earlier, I believe the amendment to confine the scope of this bill to the select committee was a prudent step. However, even as amended, I am concerned that this bill would confer original jurisdiction over such suits to the District Court for the District of Columbia and thereby eliminate the longstanding jurisdictional amount requirement of 28 U.S.C. 1331.

In addition to authorizing suits for enforcement of such subpoenas and orders, the bill also purports to authorize suits "to secure a declaration concerning the validity" of such subpoenas and orders. This latter authorization, although nebulous, appears to contemplate suits for declaratory judgment similar to the recent action filed by the Senate Select Committee on Campaign Practices.

This proposal, generated by the committee's unsuccessful suit for production of Presidential tapes and documents, does, in its present form, present serious problems of a legal and practical nature.

In its suit for declaratory judgment, the select committee specifically disavowed any intent or desire to seek a "wholesale invasion of the President's files." Furthermore, the Select Committee cautioned that this particular case "must be placed in proper perspective."

Such a cautious approach is even more appropriate in analyzing the instant legislative proposal.

Congress has always had the power to enforce its own subpoenas. Such enforcement may be compelled by the Sergeant at Arms for the Senate or the House. There is, additionally, statutory enforcement power under 2 U.S.C. 192, which makes contempt of Congress a misdemeanor.

For the first time in history, however, Congress is being asked to determine that these enforcement powers are inadequate. This dissatisfaction has resulted from an unprecedented clash between Congress and the Chief Executive in the context of a specific case—the "Watergate case." This "case" undoubtedly will generate a variety of legislative reforms. This proposal is merely the first.

Instead of solving the signal jurisdictional problem faced by the Select Committee, this proposal would cost judicial branch in the role of umpire or referee between Congress and the executive in disputes over the production of documents and information. In so doing, it flies in the face of the role of the courts in our constitutional system of government.

Such a significant incursion into traditional jurisdictional boundaries may only emphasize the ultimate constitutional obstacle blocking the success of any congressional suit against the President. That obstacle is the article III, section 2 requirement that the Federal courts entertain only justiciable cases and controversies. This constitutional barrier prevents the courts from refereeing disputes between the other two branches. It cannot be avoided or erased by congressional action. Congress cannot legislatively compel the courts to decide a basically nonjusticiable issue.

With this ultimate constitutional barrier in mind, any legislation, generated by the select committee's jurisdictional dilemma, might best be limited to resolving that specific problem. The amendment offered by the distinguished Senator from North Carolina (Mr. Ervin) is a step in that direction the bill as originally introduced would go far beyond such a modest approach by opening a whole new field of Federal jurisdiction. It is not difficult to envision a virtual flood of congressional suits against myriad executive officials and employees over the production of information and documentation in the custody of the executive branch.

There are other matters on which I wish to comment. Specific phrases and terms cry out for clarification. Foremost among these is the proposal's use of the term "order." In authorizing Congress and its committees to petition the courts for enforcement of "orders," in addition to subpoenas, the proposal becomes dangerously ambiguous. Nowhere is "order" defined. If the term is to be used, it should be defined and confined to specific areas of congressional power.

The language authorizing suits "to secure a declaration concerning the validity of any subpoena or order" is also obscure. It appears to authorize the Congress to seek an "advisory opinion" from the courts, an exercise in which courts have never indulged.

Before taking action of such a fundamental nature, I would caution my colleagues to consider the advisability of proceeding in a more deliberate manner, utilizing the traditional committee processes of the Congress.

Given the temper of the times, however, the greater likelihood is that some version of the bill will be congressionally approved. The suggested approach which narrows the scope of this bill should satisfy or gratify the demands of the times. Any general statute of broad application should be preserved for future complete legislative processing.

In such processing, the precedents in case law, and in congressional procedures, as well as the more profound and fundamental constitutional considera-

tions and requirements can be fully presented and studied. Indications of the reaches and the gravity thereof can readily be perceived by a reading of Judge Sirica's Order and Opinion filed October 17, 1973, in Civil Action No. 1593-73, the suit brought by the Senate Select Committee on Presidential Campaign Activities; and also by a reading of a staff legal memorandum which I now submit.

Mr. President, I ask unanimous consent that these documents be printed in the Record at this point.

There being no objection, the documents were ordered to be printed in the Record, as follows:

**A MEMORANDUM RE A BILL TO CONFER JURISDICTION UPON THE DISTRICT COURTS OF THE UNITED STATES OVER CERTAIN CIVIL ACTIONS BROUGHT BY THE CONGRESS, AND FOR OTHER PURPOSES**

The proposed legislation would empower Congress or Congressional Committees to petition the District Court for the District of Columbia for enforcement of Congressional subpoenas or "orders" requiring production of "information, documents, or other materials" which are in the custody of any officer or employee of the Executive branch, including the President or Vice President. In so providing, the draft bill confers original jurisdiction over such suits on the District Court for the District of Columbia and eliminates the long-standing jurisdictional anomaly requirement of 28 USC 1351.

In addition to authorizing suits for enforcement of such subpoenas and "orders," the Bill also purports to authorize suits "to secure a declaration concerning the validity" of such subpoenas and "orders." This latter authorization, although nebulous, appears to contemplate suits for declaratory judgment (28 USC 2201 et. seq.) similar to the recent action filed by the Senate Select Committee on Campaign Practices.

This proposal, generated by the Ervin Committee's unsuccessful suit for production of Presidential tapes and documents, does, in its present form, present serious problems of a legal and practical nature.

In its suit for declaratory judgment, the Ervin Committee specifically disavowed any intent or desire to seek a "wholesale invasion of the President's files" and cautioned that its case "must be placed in proper perspective." \* Such a cautious approach is even more appropriate in analyzing the instant legislative proposal.

Congress has always had the power to enforce its own subpoenas. Such enforcement may be compelled by the Sergeant of Arms for the Senate or the House. *Anderson v. Dunn*, 6 Wheat 204 (1821). There is, additionally, statutory enforcement power under 2 USC 192, which makes contempt of Congress a misdemeanor. For the first time in history, however, Congress is being asked to determine that these enforcement powers are inadequate. This dissatisfaction has resulted from an unprecedented clash between Congress and the Chief Executive in the context of a specific case—the "Watergate case."

The "Watergate case" undoubtedly will generate a variety of legislative reforms. This proposal is merely the first. It is important therefore to recall the admonition by Justice Holmes:

"Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure

which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."

Holmes, J., dissenting in *Northern Securities Co. v. United States*, 193 U.S. 197, 400-401 (1904).

Given the extraordinary climate which has generated this legislation, every effort should be made to restrict the proposal's applicability to the unique circumstances surrounding the quest for Presidential documents by the Senate Select Committee on Campaign Practices. Unfortunately, the proposed bill is not so prudently drafted. Instead of solving the signal jurisdictional problem faced by the Ervin Committee, the proposal casts the judicial branch in the role of umpire or referee between Congress and the Executive in every dispute over production of document and information by the Executive branch. In so doing, it flies in the face of the role of the courts in our constitutional system of government. To use the words of Justice Douglas, "federal courts do not sit as an ombudsman refereeing disputes between the other two branches." *Granel v. United States*, 408 U.S. 600, 640 (1972) (Douglas, J. dissenting). Such a significant expansion of traditional jurisdictional boundaries may only emphasize the ultimate Constitutional obstacle blocking the success of any congressional suit against the President. That obstacle is the Article III, § 2 requirement that the federal courts retain only justiciable cases and controversies. This Constitutional barrier prevents the courts from "refereeing disputes between the other two branches;" it cannot be avoided or erased by congressional action. See *Mississippi v. Johnson*, 4 Wall. (71 U.S.) 475, 500-501 (1868). Congress cannot legislatively compel the courts to decide a basically non-justiciable issue. Thus the instant proposal cannot and does not solve the major problem facing the Ervin Committee. Moreover, by expanding jurisdiction so radically, the justiciability problems awaiting future congressional suits of this nature may be compounded.

With this ultimate Constitutional barrier in mind, any legislation, generated by the Ervin Committee's jurisdictional dilemma, should be limited to resolving that specific problem. This proposal, however, goes far beyond such a rational approach by opening a whole new field of federal jurisdiction. It is not difficult to envision a virtual flood of congressional suits against myriad executive officials and employees over the production of information and documentation in the custody of the executive branch.

Such suits have been unnecessary in the past, despite a long tradition of claims of privilege by the executive branch. Why should a unique situation faced by a single Senate committee signal the need for such unprecedented action? In apparent disregard of Judge Sirica's ruling that the federal courts lack jurisdiction to entertain their suit against the President, the Bill's sponsors have proposed sweeping legislative revision of long-standing jurisdictional boundaries. Such hasty action is both unwise and unnecessary. The proposal should be redrafted to limit its applicability to the requirements of the Ervin Committee.

Aside from the proposal's imprudent and unnecessary breadth, there are specific phrases and terms which cry out for clarification. Foremost among these is the proposal's use of the term "order." In authorizing Congress and its committees to petition the courts for enforcement of "orders," in addition to subpoenas, the proposal becomes dangerously ambiguous. Nowhere is "order" defined. If the term is to be used—and its necessity is doubtful—it should be defined and, if necessary, confined to specific areas of traditional congressional power.

The language authorizing suit "to secure

a declaration concerning the validity of any subpoena or order" is also obscure. It appears to authorize the Congress to seek an "advisory opinion" from the courts, an exercise in which courts have never indulged. *Flast v. Cohen*, 392 US 83, 95 (1968). To avoid the possibility of such an unfortunate interpretation, the obvious intent of its drafters to authorize suit for declaratory judgment under 28 USC 2201 and 2202 should be clearly and definitely stated.

**CONCLUSION**

For 184 years it has been unnecessary for any congressional committee to file suit against the President in an attempt to obtain Presidential documents. We do not admit the necessity for such action now. That such a suit at least has been filed, and dismissed by a federal court for lack of jurisdiction, is a forceful reminder of the unprecedented nature of such a legal action and the political climate which generated it. If legislative reform is necessary to allow such a suit, it should therefore be a reform which is tailored to the need and not a sweeping expansion or revision of the judicial role in our tripartite system.

Thus the proposal should be limited to the specific needs of the Ervin Committee and should be defined and articulated in a manner which avoids unfortunate and inaccurate interpretations. To do otherwise would be a disservice to Congress, the Presidency and the Constitution.

[In the U.S. District Court for the District of Columbia, Civil Action No. 1593-73.]

**OPINION**

Senate Select Committee on Presidential Campaign Activities, suing in its own name and in the name of the United States, and Sam J. Ervin, Jr.; Howard H. Baker, Jr.; Herman E. Talmadge; Daniel K. Inouye; Joseph M. Montoya; Edward J. Gurney; and Lowell P. Weicker, Jr., as United States Senators who are members of the Senate Select Committee on Presidential Campaign Activities, Plaintiffs versus Richard M. Nixon, individually and as President of the United States, Defendant.

This matter having come before the Court on plaintiffs' Motion for Summary Judgment, and the Court having considered the memoranda and arguments of counsel, and the Court having concluded for the reasons stated in the attached opinion that it lacks jurisdiction over this matter, it is by the Court this 17th day of October, 1973, Ordered that this action be, and the same hereby is, dismissed with prejudice.

JOHN J. SIRICA, Chief Judge.

[In the U.S. District Court for the District of Columbia, Civil Action No. 1593-73.]

**OPINION**

Senate Select Committee on Presidential Campaign Activities, suing in its own name and in the name of the United States, and Sam J. Ervin, Jr.; Howard H. Baker, Jr.; Herman E. Talmadge; Daniel K. Inouye; Joseph M. Montoya; Edward J. Gurney; and Lowell P. Weicker, Jr., as United States Senators who are members of the Senate Select Committee on Presidential Campaign Activities, Plaintiffs versus Richard M. Nixon, individually and as President of the United States, Defendant.

The Court presently has before it a motion for summary judgment filed by plaintiffs. Plaintiffs are the Senate Select Committee on Presidential Campaign Activities, established by Senate Resolution 80, 83rd Congress, 1st Session (1973), and the seven United States Senators who compose the Select Committee. Richard M. Nixon, President of the United States, is defendant. The action is styled "Complaint for declaratory judgment, mandatory injunction and mandamus."

\* "Memorandum in Support of Motion for Summary Judgment," at page 1.

Facts concerning the origin of this action are not controverted. The Senate Select Committee on Presidential Campaign Activities (Select Committee) became a duly authorized and constituted committee of the United States Senate on February 7, 1973, "empowered to investigate and study 'illegal, improper or unethical activities' in connection with the Presidential campaign and election of 1972 and to determine the necessity of new legislation 'to safeguard the electoral process by which the President of the United States is chosen.'"<sup>1</sup> In the course of its investigatory procedures, the Select Committee heard one Alexander<sup>2</sup> Butterfield, formerly a Deputy Assistant to the defendant, Mr. Butterfield testified that the President had electronically recorded conversations occurring in various of his offices during a period of time that included the campaign and election of 1972. This testimony was later confirmed by Presidential counsel, J. Fred Bushardt.<sup>3</sup>

Upon learning that among these recorded conversations were a series which they regarded as highly relevant to their investigation, plaintiffs commenced informal efforts to secure the pertinent tape recordings as well as various written documents. Plaintiffs were still remain convinced that the recorded account of these presidential conversations, together with written White House documents alluded to by witnesses at their hearings, would undoubtedly contain information having an important bearing on their investigation and would probably resolve critical conflicts in the testimony of several key witnesses.

When informal attempts proved unsuccessful, the Select Committee directed two subpoenas *duces tecum* to the defendant President. Both were served on July 23, 1973, and together with proof of service, are attached as exhibits to the complaint herein.

The first required production of the tape recordings of five meetings which were in each instance attended by the defendant President and then White House counsel, John W. Dean, III. Other persons had also been present during some of these conferences. As noted in the subpoena, the meetings occurred on September 15, 1972, February 28, 1973, March 13, 1973, and March 21, 1973, with two meetings on the last mentioned date. The second subpoena sought documents and other materials "relating directly or indirectly to [an] attached list of [25] individuals and to their activities, participation, responsibilities or involvement in any alleged criminal acts related to the Presidential election of 1972." Defendant filed no objection to either subpoena or to service thereof, although in a subsequent filing counsel have characterized the second subpoena as oppressive. Defendant's sole response consisted of a letter to Select Committee Chairman Senator Sam J. Ervin, Jr., expressing the President's intention not to comply with the subpoenas and the reasons for his decision. The President's letter is also appended to the complaint herein as an exhibit. It is understood that although the subpoenaed tape recordings had previously been in the custody of others, at the time the subpoenas were issued, and at present, they are within the sole possession, custody and control of the defendant President.<sup>4</sup>

Plaintiffs next proceeded to file with the Court the present civil action. They deliberately chose not to attempt an adjudication of the matter by resort to a contempt proceeding under Title 2, U.S.C. § 192, or via Congressional common-law powers which permit the Sergeant at Arms to forcibly secure attendance of the offending party. Either method, plaintiffs state, would here be inappropriate and unseemly. On the day defendant filed his answer to the complaint,

plaintiffs submitted a motion for summary judgment. A response to the motion and other memoranda were subsequently filed, and the matter came on for oral argument on October 4, 1973. In their subsequent pleadings and at oral argument, plaintiffs have emphasized that portion of the complaint which seeks a declaratory judgment. It is argued that such judgment include the following statements:

(1) That the two subpoenas were lawfully issued and served by plaintiffs and must be complied with by defendant President;

(2) That defendant President may not refuse compliance on the basis of separation of powers, executive privilege, Presidential prerogative or otherwise;

(3) That defendant President by his action to date has breached the confidentiality of the materials subpoenaed and waived any privilege that might have applied to them.

The prayer for a mandatory injunction and/or relief by way of mandamus has been referred to the Court's discretion and otherwise ignored by plaintiffs.

The case presents a battery of issues including jurisdiction, justiciability, invocation of the declaratory judgment statute, executive privilege, waiver of privilege, validity of the Select Committee's investigation, and authority of the Select Committee to subpoena and bring suit against the President. Because of its ruling, the Court has found it necessary to consider only one question, that being whether the Court has jurisdiction to decide the case. The Court has concluded, for the reasons outlined below, that it lacks such jurisdiction, and the action is therefore dismissed with prejudice.

The Court has recently decided another case involving some of the same tape recordings that are here at issue.<sup>5</sup> As its caption indicates, that matter concerned a subpoena *duces tecum* issued to the President by a grand jury. It was there ruled that compliance with the subpoena could be judicially required as to unprivileged matter and that the Court was empowered to determine the applicability of any privilege. The case is presently the subject of appellate review.

This present case, by contrast, is a civil complaint, and in such actions particularly, jurisdiction is a threshold issue. Some elementary principles perhaps need restating here. For the federal courts, jurisdiction is not automatic and cannot be presumed. Thus, the presumption in each instance is that a federal court lacks jurisdiction until it can be shown that a specific grant of jurisdiction applies. Federal courts may exercise only that judicial power provided by the Constitution in Article III and conferred by Congress. All other judicial powers or jurisdiction is reserved to the states. And although plaintiffs may urge otherwise, it seems settled that federal courts may assume only that portion of the Article III judicial power which Congress, by statute, entrusts to them.<sup>6</sup> Simply stated, Congress may impart as much or as little of the judicial power as it deems appropriate and the Judiciary may not thereafter on its own motion recur to the Article III storehouse for additional jurisdiction. When it comes to jurisdiction of the federal courts, truly, to paraphrase the scripture, the Congress giveth, and the Congress taketh away.<sup>7</sup> Finally, the principle is firmly established that jurisdictional requirements cannot be waived.

Plaintiffs have cited four statutory bases any and all of which, according to their submission, grant jurisdiction here. Before proceeding to analyze these provisions, however, it should be noted that the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and Rule 67 of the Federal Rules of Civil Procedure do not themselves confer jurisdiction. These statutes, as defendant points

out, are procedural only and do not constitute the jurisdictional statute necessary to consideration of a specific declaratory judgment action.<sup>8</sup>

One of the four statutory bases of jurisdiction cited by plaintiffs is 28 U.S.C. § 1346 which reads:

§ 1346. United States as plaintiff

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

Plaintiffs have disclaimed any attempt to classify themselves as an "agency or officer" within the meaning of this section. Rather they purport to bring suit in the name of the United States. Reference, however, to common practice and related statutory provisions belies the soundness of such a claim. Title 28 U.S.C. § 516, in language similar to that of § 1346, reserves to the Attorney General and Department of Justice authority to litigate as United States.

§ 516. Conduct of litigation reserved to Department of Justice

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

While this section does not require a congressional litigant to be represented by the Justice Department, it does deny such a litigant the right to sue as the United States when jurisdiction derives from § 1346.<sup>9</sup> The practice has been otherwise and the two cases cited by plaintiffs do not so hold.<sup>10</sup> Section 1345 is simply inapplicable here.

A second statute called to the Court's attention is 28 U.S.C. § 1361. That statute provides:

§ 1361. Action to compel an officer of the United States to perform his duty.

The district courts shall have original jurisdiction of any action in the nature of a mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

In attempting to meet the terms of § 1361, plaintiffs impute to the defendant President a "legal duty to respond to and to comply with . . . [Select Committee] subpoenas." As defendant indicates, however, the traditional criteria for mandamus proceedings apply here<sup>11</sup> and only a "ministerial, plainly defined and peremptory" duty may properly be the subject of such proceedings.

Before such a writ may issue, it must appear that the claim is clear and certain and the duty of the officer involved must be ministerial, plainly defined, and peremptory. *Huddleston v. Dwyer*, 10 Cir. 145 F.2d 311. The duty sought to be exercised must be a positive command and so plainly prescribed as to be free from doubt. *Widbur v. United States ex rel. Kodre*, 281 U.S. 260, 50 S. Ct. 320, 74 L.Ed. 809.<sup>12</sup>

These criteria have not been satisfied.

After reading cases that have considered applications for mandamus, the Court cannot in good conscience hold that any duty defendant may have as President is "plainly defined and peremptory" as that phrase has been interpreted.<sup>13</sup> Mandamus properly issues to enforce such duties as that of a government officer to issue a driver's or marriage license when all licensing requirements are met or that of a military official to confer an honorable discharge where the law so provides. In every case, official duties are involved. No analogous obligation appears here. Regardless of whatever duty the President may owe the Select Committee as a citizen with evidence in his possession, it is not "free from doubt" that his official responsibility

<sup>1</sup>Footnotes at end of article.

ities require compliance. There is nothing in the Constitution, for example, that makes it an official duty of Presidents to comply with Congressional subpoenas."

A fair reading of § 1331 cannot sustain jurisdiction here.

As a third statutory basis of jurisdiction, plaintiffs cite the Administrative Procedure Act, 5 U.S.C. § 701-706. There is some question whether the President is an "agency" for purposes of the Act, whether "agency action" is involved here, and whether plaintiffs have suffered a "legal wrong" within the meaning of these provisions.<sup>1</sup> A final resolution of these problems, however, is unnecessary here since the rule in this Circuit precludes use of this Act altogether as an independent basis of jurisdiction.<sup>2</sup> The Administrative Procedure Act does not confer jurisdiction where an action is not otherwise cognizable by the federal courts. Plaintiffs have urged that although this was once the rule in the District of Columbia, the *Independent Broker-Dealers Trade Association v. SEC* case at 442 F.2d 139 (D.C. Cir. 1971), cert. denied 404 U.S. 828 (1972) has effectively overruled the earlier position. The Court does not so read *Independent Broker-Dealers*. Plaintiffs there enjoyed an independent basis for jurisdiction in 28 U.S.C. § 1331, and the ruling concerned not whether the APA itself afforded jurisdiction but whether the SEC's informal act was reviewable and whether any such review might be had in the District Court. The Court held that an SEC letter to the New York Stock Exchange requesting that the Exchange prohibit "customer-directed give ups" constituted judicially reviewable "agency action." The Court agrees with defendant's counsel that it is hardly probable the Court of Appeals would overrule its prior decisions without any reference to them.

The Court concludes that the Administrative Procedure Act cannot serve to grant jurisdiction here.

Plaintiffs have placed principal reliance for purposes of jurisdiction on 28 U.S.C. § 1331. That statute, often termed the "federal question" jurisdiction statute, provides in pertinent part as follows:

§ 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000 exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

Unlike the statutes heretofore discussed, this provision includes a monetary sum or value as an incident of jurisdiction, the \$10,000 jurisdictional amount. Although the amount has varied over the years, defendant is correct in his assertion that whatever the sum, it is a jurisdictional prerequisite.<sup>3</sup> The satisfaction of a minimum amount-in-controversy is not a technicality; it is a requirement imposed by Congress which the courts may not dispense with at their pleasure.

While some decisions have held to the contrary, most notably *Spock v. David*, 469 P.2d 1047 (3rd Cir. 1972), it is the near-universal view that a right or matter in controversy must be capable of valuation in dollars and cents to sustain jurisdiction under § 1331.<sup>4</sup> To the Court, this constitutes not only the majority but the more realistic analysis of the amount-in-controversy requirement. Where it desires to award jurisdiction over cases involving important rights without regard to a monetary valuation, the Congress is capable of excluding such restrictions; witness, for example, the civil rights and elective franchise statute at 28 U.S.C. § 1343. Thus, where Congress has re-

quired a jurisdictional sum, it would seem unwarranted for a court to presume that the limitation was unintentional.<sup>5</sup>

The question therefore becomes whether a quantifiable amount-in-controversy of sufficient value to satisfy the statutory minimum, exists here. The parties agree, and it is well settled that in determining the amount-in-controversy, reference to either party's situation is appropriate, there the case is worth at least \$10,000 to the defendant, the requirement is satisfied just as fully as where a plaintiff can demonstrate the \$10,000 value or sum.

Computations measure the "value of the object of the suit, *Mississippi v. Missouri R.R. Co. v. Ward*, 2 Black (57 U.S.) 485 (1862), that is the monetary value of objects at issue or direct monetary impact of an adjudication. The object here could be described as either the tapes and documents themselves or as access to the information contained therein. Since intrinsically, the tape recordings and documents do not approach a \$10,000 value, we look instead to the value of a disposition either granting or denying the declaratory judgment and other relief sought.

Plaintiffs suggest several possible analyses by which existence of the required minimum value may be established. It appears to the Court, however, that none of these proposals will work. First, in an affidavit of the Select Committee Chairman appended to their Supplemental Memorandum, plaintiffs calculate the expenses they will incur if compelled to secure from other sources the information contained in the subpoenaed materials. Though the Court does not dispute this assessment, it nevertheless cannot accept such indirect costs as the amount-in-controversy. Alternatives means of achieving the object of a suit or collateral results of a judgment are not properly considered in computing the jurisdictional minimum under § 1331.<sup>6</sup> The cost of added Committee work to ferret out the desired information is quite clearly the cost of an alternative procedure. Nor is the Select Committee's appropriation of a valid measure. The decision in *Williams v. Phillips*, 7 F. Supp. \_\_\_\_ (D.D.C. 1973, C.A. No. 490-73), the only authority cited for this proposition, contains no such holding. Plaintiffs have not attempted to quantify the direct impact of a judicial decision, and indeed, it appears to the Court that such an appraisal is impossible from either party's viewpoint.

Second is a suggestion that the rights and responsibilities of legislators exceed the \$10,000 minimum. The restriction to a dollars and cents evaluation of the matter in controversy, however, logically precludes an assumption that the value of such a right can satisfy § 1331. The value of the right or duty must be quantifiable.<sup>7</sup> There must be some financial gain or loss associated directly with sustaining, rejecting or declaring the right. The Supreme Court has only recently reminded us that in suits against federal officials under § 1331, "it is necessary to satisfy the amount-in-controversy requirement for federal jurisdiction." *Lyons v. Household Finance Corp.*, 405 U.S. 538, 547 (1972). Any direct financial consequence to rights or duties is not apparent in this case.

Finally, regarding value from defendant's viewpoint, the Court cannot find any basis on which to assign a dollar value to the matter in controversy. Just as the constitutional obligations of legislators, defendant's interest, whatever it may be termed, is incapable of such an appraisal. Each of the plaintiff's assertions, then, regarding the amount-in-controversy are legally inadequate, and finding no possible valuation of the matter which satisfies the \$10,000 minimum, the Court cannot assert jurisdiction by virtue of § 1331.

No jurisdictional statute known to the Court, including the four which plaintiffs

name, warrants an assumption of jurisdiction, and the Court is therefore left with no alternative here but to dismiss the action.

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Because of its conclusion and disposition, the Court does not reach the problem of justiciability or the merits of the case. Any comment on these matters therefore is inappropriate, and the Court does not proffer its views.

The Court has here been requested to invoke a jurisdiction which only Congress can grant but which Congress has heretofore withheld. Whether such jurisdiction ought to be conferred is the prerogative of the Congress. Plaintiffs, of course, are free to pursue whatever remedy they now deem appropriate, but the Court cannot, consistent with law and the constitutional principles that reserve to Congress the conferral of jurisdiction, validate the present course.

October 17, 1973. *Samuel J. Sentra, Chief Judge.*

#### FOOTNOTES

<sup>1</sup> "Statement of Material Facts as to which there is no Genuine Issue" filed by plaintiffs on August 29, 1973, at 1. Counsel for the defendant President acknowledged in Court on October 4, 1973, that defendant takes no issue with plaintiffs' statement.

<sup>2</sup> *Id.* at 2.

<sup>3</sup> *Id.* at 3.

<sup>4</sup> *Taglia* Richard Jury Subpoena Duces Tecum Issued to Grand M. Nixon, etc., 360 F. Supp. 1 (D.D.C. 1973).

<sup>5</sup> The Supreme Court and the Court of Appeals for this Circuit have affirmed that jurisdiction fails "if the cause is not one described by any jurisdictional statute." *Powell v. McCormack*, 395 U.S. 486, 512-513 (1969) citing *Baker v. Carr*, 369 U.S. 186, 198-199 (1962). See also *Curtis v. Curtis*, 3 How. (44 U.S.) 238, 245 (1845) and *United States Servicemen's Fund v. Eastland*, \_\_\_\_ F.2d \_\_\_\_ (No. 24,279 August 30, 1973) (D.C. Cir. 1973). Reference to Article III, § 2 alone is insufficient.

<sup>6</sup> For the contrary proposition plaintiffs cite six decisions: *New York Times Co. v. U.S.*, 403 U.S. 713 (1971); *Sanitary District of Chicago v. U.S.*, 268 U.S. 405 (1925); *In Re Debs*, 158 U.S. 364 (1895); *U.S. v. Arlington County*, 326 F.2d 929 (4th Cir. 1964); *U.S. v. Brand Jewelers, Inc.*, 318 F. Supp. 1293 (S.D.N.Y. 1970); and *U.S. v. Brittain*, 319 F. Supp. 1058 (N.D. Ala. 1970). None of these cases, however, holds that the government or anyone else may invoke jurisdiction of the federal courts without utilizing a specific jurisdictional statute. Each were initially brought by the United States and jurisdiction apparently invoked under 28 U.S.C. § 1345, or its predecessor, an independent statutory base applicable to the government.

<sup>7</sup> *Job 1:21* (The Holy Bible).

<sup>8</sup> See, *Exhily Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 697, 671 (1950) *Std Acina Life Ins. Co. v. Haworth*, 300 U.S. 227, 249 (1937).

<sup>9</sup> *CF.* *Confiscation Cases*, 7 Wall. (74 U.S.) 454, 467 (1868). It may be argued that Senate Resolution 262, 70th Congress, 1st Session (1928) permits the Select Committee to sue in the name of the United States here despite the provisions of § 516. Resolution 262 states in pertinent part:

[Any committee of the Senate is hereby authorized to bring suit on behalf of and in the name of the United States in any court of competent jurisdiction if the committee is of the opinion that the suit is necessary to the adequate performance of the powers invested in it or the duties imposed upon it. . . .

It occurs to the Court that there are at least three responses which answer this claim. First, insofar as the Senate Resolution is inconsistent with the provisions of § 516, it would appear that the statute, enacted by both Houses of Congress, should

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control over the Resolution of one House. Second, any exception to § 516 must be one "authorized by law." Although the question has never been specifically litigated, it seems apparent that "law" in § 516 would not include a legislative action of the sort represented by S. Res. 262. The term "law" does not normally encompass within its definition "resolution," and all recognized exceptions to § 516, such as 10 U.S.C. § 1037, are statute laws enacted by both Houses. In addition, the Supreme Court has hinted that authorization of legislative committees to sue as the United States under § 1345 may require a specific statutory enactment. The Court in *Reed v. County Commissioners*, 277 U.S. 376 (1928), did not reach the question of whether a Senate committee could act as the United States under 28 U.S.C. § 41 (predecessor to 28 U.S.C. § 1345), because "even if it be assumed that the Senate alone may give that authority," it had not even attempted to do so. 277 U.S. at 388 (italics added).

Third, and most importantly, the language and historical setting of S. Res. 262 lead to the conclusion that it was intended not to confer jurisdiction, but to ensure standing in lawsuits. Both parties agree that the Senate adopted S. Res. 262 in response to the Supreme Court decision in *Reed*. As just noted, the *Reed* Court did not reach the issue of statutory jurisdiction because it found that the Senate Special Committee lacked standing. 277 U.S. at 388. S. Res. 262 was intended to correct that defect, and thus it authorized committees to sue "in any court of competent jurisdiction." This language traditionally means courts that already have jurisdiction, that are presently competent to consider the case, pursuant to some independent statutory provision. It does not itself serve to bestow jurisdiction.

\* Plaintiffs cited in *Re Hearings by the Committee on Banking and Currency*, 245 F.2d 667 (7th Cir. 1957) and in *Re Hearings by the Committee on Banking and Currency*, 19 F.R.D. 410 (N.D. Ill. 1956).

\* See, Senate Report No. 1992, 87th Cong., 2nd Sess. pp. 2-4 (1962); 28 U.S.C. § 1361 did not create a new or distinct cause of action.

\* *Prarie Zand of Potawatomi Tribe of Indians v. Udall*, 355 F. 2d 364, (10th Cir.) cert. denied 385 U.S. 831 (1966).

\* See, e.g., *Harmon v. Brucker*, 355 U.S. 579 (1958); *McGaw v. Farrow*, 472 F.2d 952 (4th Cir. 1973); *Spock v. David*, 467 F.2d 1047 (3rd Cir. 1972); *United States v. Walker*, 409 F.2d 477 (9th Cir. 1969); *Greffanti v. Hershey*, 298 F. Supp. 553 (S.D. N.Y. 1969); *Switzerland Co. v. Udall*, 225 F. Supp. 912 (W.D.N.C. 1964) aff'd 337 F.2d 56 (4th Cir. 1964) cert. denied 380 U.S. 914 (1965).

\* Plaintiffs misread the prior opinion of this Court when they think they find a declaration therein that Presidents have a duty, ministerial in nature, to comply with subpoenas. The Court rather stated that defendant's obligation to produce unprivileged evidence was "more akin to a ministerial duty" than to a discretionary one, "if indeed it concerns official duties at all." In *Re Grand Jury Subpoena Duces Tecum* Issued to Richard M. Nixon, et al., 380 F. Supp. 1, n.21 (D.D.C. 1973), (emphasis added). In sustaining the Court's position in that case, the Court of Appeals for this Circuit characterized the responsibility of the President to produce evidence as one of the "routine legal obligations that confine all citizens." *Nixon v. Sirica*, F.2d (No. 78-1962 October 12, 1973) (D.C. Cir. 1973), at page 18 slip opinion.

\* Plaintiffs cite *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737 (D.D.C. 1971), the decision of a three-judge court written by Circuit Judge Leventhal, as definitively establishing that the President is an "agency for purposes of the statute. As the Court reads that decision, however, and as defendant suggests, that

issue was specifically left open. The opinion does include the following statement cited by plaintiffs:

The leading students of the APA, whose analyses are often cited by the Supreme Court, and who on some matters are in conflict with each other, seem to be in agreement that the term "agency" in the APA includes the President—a conclusion fortified by the care taken to make express exclusion of "Congress" and "the Courts," 337 F. Supp. at 761 (footnote omitted).

Nevertheless, in the next sentence the court writes:

\* But we need not consider whether an action for judicial review can be brought against the President *ex nomine*. 337 F. Supp. at 761.

The Court of Appeals in this Circuit has also left open this question. See, *Soucie v. David*, 448 F.2d 1967, 1973 n. 17 (D.C. Cir. 1971). Defendant further notes, "It is hard to imagine that a statute that excludes from its operation even the governments of the territories and the Mayor of the District of Columbia should be held to have included, in its bland and neutral language, the President of the United States." Brief in opposition at 33 p. 7.

"Agency action" is defined by the statute as "the whole or a part of any agency rule, order, license, sanction, relief or the equivalent or denial thereof, or the failure to act," 5 U.S.C. § 551 (13). Plaintiffs cite this language as aptly describing "the President's failure to turn over the evidence which the committee has demanded." \*\*\* In fact, the term "adjudication" as defined by the APA, could well apply to the President's action. See 5 U.S.C. § 551 (6 and 7). Reply Memorandum at 18. Defendant interprets the same definition as applicable only to the "rule-making" and "formulation of orders" functions of agencies, categories into which his actions do not fall. Brief in opposition at 33, 34.

\* 5 U.S.C. § 702 provides:

A person suffering legal wrong because of agency action or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

The plaintiffs claim a legal right of the Committee to have its lawful subpoenas obeyed by the President and cite principally *Watkins v. U.S.*, 354 U.S. 178 (1957) and *McGrain v. Daugherty*, 273 U.S. 135 (1927). Supplemental Memorandum at 27; Reply Memorandum at 18, 19. Defendant maintains that although plaintiffs may have cited an adverse effect, they have not pointed to an illegal effect recognized by law. He cites Senate Report No. 752, 79th Congress, 1st Session (1945) at 26, and *Kansas City Power & Light Co. v. McKay*, 235 F.2d 824 (D.C. Cir.) cert. denied 350 U.S. 854 (1955). Brief in Opposition at 34.

\* See *Pan American World Airways, Inc. v. CAB*, 392 F.2d 483, 494 (D.C. Cir. 1968); *Kansas City Power & Light Co. v. McKay*, 235 F.2d 824, 832-833 (D.C. Cir.) cert. denied 350 U.S. 854 (1955); *Almour v. Pace*, 193 F.2d 896, 701 n. 5 (D.C. Cir. 1951). Such is the rule in other circuits as well. See, e.g., *Arizona State Dept. of Public Welfare v. Dept. of Health, Education and Welfare*, 449 F.2d 456, 460 (9th Cir. 1971), cert. denied 405 U.S. 919 (1972); *Zimmerman v. United States Government*, 422 F.2d 326, 330-331 (3rd Cir.), cert. denied 399 U.S. 911 (1970); *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529, 532 (8th Cir. 1967); *Chouros v. United States*, 335 F.2d 918, 919 (10th Cir. 1964); *Local 642, International Union of Operating Engineers v. NLRB*, 328 F.2d 850, 854 (2d Cir.), cert. denied 379 U.S. 826 (1964); *One Gustavson Contracting Co. v. Fleet*, 278 F.2d 912, 914 (2d Cir.), cert. denied 364 U.S. 894 (1960).

\* See, e.g., *Holt v. Indiana Mfg. Co.*, 176

U.S. 68 (1900) and *U.S. v. Sayward*, 160 U.S. 493 (1895).

\* See, e.g., *Barry v. Mercein*, 5 How. (46 U.S.) 103 (1847); *McClaw v. Farrow*, 472 F.2d 952 (4th Cir. 1973); *Kneal v. Port of New York Authority*, 457 F.2d 46 (2nd Cir. 1972); *Goldsmith v. Sutherland*, 425 F.2d 1395 (8th Cir. cert. denied 400 U.S. 980 (1970)); *Rosado v. Wyman*, 414 F.2d 170 (2nd Cir. 1969), reversed on other grounds 397 U.S. 397 (1970); *Rapoport v. Rapoport*, 416 F.2d 41 (5th Cir. 1969) cert. denied 397 U.S. 916 (1970); *Giancana v. Johnson*, 335 F.2d 368 (7th Cir. 1964) cert. denied 379 U.S. 1001 (1965).

\* Defendant states that Congress has had before it several times legislation "rewriting the statute to remove the amount in controversy requirement in cases in which constitutional rights are asserted against federal officers," but has each time failed to enact it. Brief in Opposition at 24.

\* See, e.g., *Healy v. Ratta*, 292 U.S. 263 (1934); *Lion Bonding & Surety Co. v. Karatz*, 262 U.S. 77 (1923); *Town of Elgin v. Marshall*, 106 U.S. 578 (1882); *Quinn v. Tribe of Indians v. Gallagher*, 368 F.2d 648 (9th Cir. 1966) cert. denied, 387 U.S. 907 (1967).

For the contrary proposition plaintiffs cite *Petroleum Exploration Co. v. Public Service Commission*, 304 U.S. 209 (1938); *Bitterman v. Louisville & Nashville R.R.*, 307 U.S. 205, 224-35 (1937); and *Federated Mutual Implement & Hardware Ins. Co. v. Steinhilber*, 268 F.2d 734 (8th Cir. 1959). In each of these instances, however, parties stood to suffer monetary losses in excess of the jurisdictional amount as the direct result of a judgment. In *Petroleum Exploration* it was the expense a Maine corporation would incur if forced to appear and give information pursuant to an order of the Kentucky Public Service Commission. In *Bitterman*, it was a railroad's financial loss if ticket sales by brokers were not enjoined. The *Federated Mutual* case concerned losses that would befall an insurance company if a former sales agent were not restrained from competing in the insurance business for two years.

\* Plaintiffs urge that *Kennedy v. Sampson* (D.D.C., C.A. 1565-72, August 16, 1973) and *Holtzman v. Richardson* (S.D.N.Y., 73-C-537, July 25, 1973) reversed, — F.2d — (2nd Cir. 1973) found that the constitutional rights and duties of legislators met the monetary requirement of § 1331. This conclusion, however, seems inaccurate. *Kennedy* did not discuss jurisdiction but was apparently a § 1361 case (performance of a ministerial duty). In *Holtzman*, the object of the controversy from defendants' viewpoint (bombing in Cambodia) far exceeded the \$10,000 jurisdiction sum. As plaintiffs note, a court in this district has apparently ruled that the inherent value of a constitutional right to vote "must be equal to any amount set for jurisdictional purposes."

West End Neighborhood Corporation v. Stans, 312 F. Supp. 1068 (D.D.C. 1970). This Court, however, cannot justify a conclusion that the *Stans* decision represents the law in this or any Circuit with the possible exception of the Third, and accordingly, with due respect, cannot regard that precedent.

To say that constitutional rights are incapable of a monetary assessment is not to say that they are petty or worthless. All persons realize, or should realize, that their value is unsurpassed. Such value, however, is simply not the type intended to satisfy the monetary restrictions of § 1331. Other statutes may grant jurisdiction in some of these cases, but § 1331 does not.

The PRESIDING OFFICER. The question is on agreeing to the substitute amendment of the Senator from North Carolina.

The substitute amendment was agreed to.

The PRESIDING OFFICER. The ques-

tion is on the engrossment and third reading of the bill.

The bill (S. 2641) was ordered to be engrossed for a third reading, was read the third time and passed, as follows:

S. 2641

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the District Court of the United States for the District of Columbia shall have original jurisdiction, without regard to the sum or value of the matter in controversy, of any civil action heretofore or hereafter brought by the Senate Select Committee on Presidential Campaign Activities, which was created on February 7, 1973, by Senate Resolution Numbered 60, to enforce or secure a declaration concerning the validity of any subpoena or order heretofore or hereafter issued by said committee to the President or the Vice President or any other officer of the United States or any officer or employee of any department or agency of the United States to procure the production before the said committee of any information, documents, taped recordings, or other materials relevant to matters the said committee is authorized to investigate, and the said district court shall have jurisdiction to enter any such judgment or decree in any such civil action as may be necessary or appropriate to enforce, obedience to any such subpoena or order.

(b) The Senate Select Committee on Presidential Campaign Activities shall have authority to prosecute in its own name or in the name of the United States in the District Court of the United States for the District of Columbia any civil action heretofore or hereafter brought by said committee to enforce or secure a declaration concerning the validity of any subpoena or order heretofore or hereafter issued by said committee to the President or Vice President or any other officer of the United States or any officer or employee of any department of the United States to procure the production before the said committee of any information, documents, taped recordings, or other materials relevant to the matters the committee is authorized to investigate, and pray the said district court to enter such judgment or decree in said civil action as may be necessary or appropriate to enforce any such subpoena or order.

(c) The Senate Select Committee on Presidential Campaign Activities may be represented by such attorneys as it may designate in any action prosecuted by said committee under this Act.

Mr. ERVIN. I move to reconsider the vote by which S. 2641, as amended, was passed by the Senate.

Mr. MANSFIELD. Mr. President, I move to lay that motion on the table. The motion to lay on the table was agreed to.

The title was amended so as to read: To confer jurisdiction upon the District Court of the United States of certain civil actions brought by the Senate Select Committee on Presidential Campaign Activities, and for other purposes.

Mr. ERVIN. Mr. President, I ask unanimous consent that the Secretary of the Senate be authorized to make technical and clerical corrections in the engrossment of S. 2641, as amended and passed in the Senate today.

The PRESIDING OFFICER. Without objection, it is so ordered.

#### ORDER OF BUSINESS

The ACTING PRESIDENT pro tempore. At this time, in accordance with the

previous order, the Chair recognizes the distinguished Senator from Arkansas (Mr. FULBRIGHT) for not to exceed 15 minutes.

#### DÉTENTE AND THE MIDDLE EAST

Mr. FULBRIGHT. Mr. President, as the Middle East crisis continues, its consequences are felt beyond the region in concentric rings. One immediate effect has been the acute fuel shortage necessitating the emergency measures called for by the President in his speech of November 7. The energy crisis is by no means solely the result of the partial and selective Arab boycott; even the Canadians have chosen this moment to increase the price of their oil, and the United States imports more oil from Canada than from any other foreign country. Increased costs and shortages of fuel will inevitably result not only in discomfort for most Americans and hardship for many farmers and others whose livelihood is affected, but also in shortages of other, petroleum-based goods, shortages which will accelerate inflation.

The Middle East war has also provided grist for the mill of our redoubt cold warriors, who have seized this occasion to attack cooperation with the Soviet Union.

This morning it was reported that the Pentagon will request a \$3-billion to \$4-billion increase in the military budget. The administration had already requested an additional \$2.2 billion to pay for arms shipped to Israel.

Assaults upon the merits of détente with the Soviet Union are not only inflammatory but sterile. They are sterile because the detractors seem to assume that there is a satisfactory alternative to Soviet-American cooperation, when in fact the only alternative is the cold war with its endless polemics, the ruinous arms race, and periodic trips to the nuclear brink. It may well be granted that Soviet-American cooperation in the current Middle East crisis has been less than might have been desired, but does it follow that we would be better off if there had been no cooperation at all? The burden of proof has been placed on the wrong side. Instead of holding the advocates of détente to an exacting, if not impossible, standard, the detractors ought to be required to show that they have something better to offer.

I doubt that they can, although it appears that they shall have their chance. Bowing to political reality, the administration has abandoned for the time being its effort to secure equal trade treatment for the Soviet Union. It did so to avoid a prospective congressional vote on the Jackson amendment, which would make both equal trade treatment and ordinary commercial credits contingent upon free emigration from the Soviet Union—a blatant intrusion upon internal Soviet affairs. The result is that, for the time being at least, Soviet trade will continue to be discriminated against, and we shall now see how the Jackson approach works for our national interest. We shall see specifically, whether continued trade discrimination provides leverage for Soviet-American cooperation in the Middle East, and whether it will induce the Russians

to drop remaining emigration controls and grant civil liberties to its citizens.

Perhaps the Jackson approach will work, but if it should fail to bring the desired results, the congressional majorities which have insisted upon linking equal trade treatment with internal reforms within the Soviet Union may wish to reconsider their attitude toward détente and intervention in Soviet internal affairs.

My own view is that the best—and most—we can do to advance the cause of liberties within the Soviet Union is to build an international atmosphere or climate of security and confidence through trade, investment, cultural exchange, frequent political contacts, and above all, arms control. These are also the best we can do for world peace—and for peace in the Middle East.

Whether or not the Soviet-American encounter of October 24 and 25 qualifies as the "most difficult crisis" since the Cuban missile crisis of 1962 as President Nixon said, it was serious enough to point up the surpassing importance of Soviet-American cooperation in matters of world peace, and also to point up the interest of all nations in the resolution once and for all of the Arab-Israel conflict which brought the great powers to the crisis of late October. The temptations to recrimination are strong: President Nixon may have overreacted with the military alert, but that is over and done with, and the crisis ended with the joint Soviet-American sponsorship of the United Nations emergency force to supervise the truce.

It is also being widely contended that the mere threat of unilateral Soviet military intervention in the Middle East proves the hollowness of détente. Are we to conclude that a cold war stance would have served us better? Would the Soviets have shown greater restraint and good faith if our relations were still frozen as in Stalin's time? It seems hardly likely. Instead of dismantling the détente, the logical implication of the crisis of late October is the need to strengthen Soviet-American cooperation.

The fact that détente is fragile does not mean that it is futile. Quite the contrary: every time the two great nuclear powers come to a point of confrontation, the necessity of détente is reinforced. What the detractors cannot seem to get through their heads is that there is no alternative except endless conflict. We and the Russians have to get along with each other, because in matters of world peace, neither can get along without the other.

I underline that by reiterating the existence of nuclear warfare, the nuclear arms about which we have talked so much in this body.

Perhaps there has been some misunderstanding of the meaning of détente. It does not mean that the two superpowers have come to see everything eye to eye; on the contrary, we remain political rivals with inimical political systems. Détente, in its essence, is an agreement not to let these differences explode into nuclear war. We may hope to mitigate our ideological differences through time and human contact, but we dare not force the pace lest we undercut the purpose of

the legitimate claims of those who opposed settling aside any area and those who favored a smaller preserve.

The uniqueness of the Big Thicket can easily be seen in the committee report which makes available to the Members of the House pictures showing the remarkable character of the area.

The gentleman from Texas (Mr. KAZEN) has been extremely effective in the Interior Committee in advancing the Big Thicket proposal and I am personally appreciative for the information and advice he has given me in this regard.

The same is true for Mr. STEELMAN, who is also a member of the Interior Committee and who is among those most responsible for bringing about the final bill that obtained the backing of the committee and, hopefully, its passage by the House today.

The SPEAKER pro tempore (Mr. McFALL). The question is on the motion offered by the gentleman from North Carolina (Mr. TAYLOR) that the House suspend the rules and pass the bill H.R. 11546.

The question was taken; and—two-thirds having voted in favor thereof—the rules were suspended and the bill was passed.

A motion to reconsider was laid on the table.

#### GENERAL LEAVE

Mr. TAYLOR of North Carolina. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days in which to revise and extend their remarks immediately before the passage of the bill (H.R. 11546).

The SPEAKER. Is there objection to the request of the gentleman from North Carolina?

There was no objection.

#### CONFERRING JURISDICTION ON U.S. DISTRICT COURT FOR DISTRICT OF COLUMBIA OF CERTAIN CIVIL ACTIONS BROUGHT BY SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES

Mr. KASTENMEIER. Mr. Speaker, I move to suspend the rules and pass the Senate bill (S. 2641) to confer jurisdiction upon the district court of the United States of certain civil actions brought by the Senate Select Committee on Presidential Campaign Activities, and for other purposes.

The Clerk read as follows:

S. 2641

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the District Court of the United States for the District of Columbia shall have original jurisdiction, without regard to the sum or value of the matter in controversy, of any civil action heretofore or hereafter brought by the Senate Select Committee on Presidential Campaign Activities, which was created on February 7, 1973, by Senate Resolution Numbered 60, to enforce or secure a declaration concerning the validity of any subpoena or order heretofore or hereafter issued by said Committee to the President or

the Vice President or any other officer of the United States or any officer or employee of any department or agency of the United States to procure the production before the said Committee of any information, documents, taped recordings, or other materials relevant to matters the said Committee is authorized to investigate, and the said District Court shall have jurisdiction to enter any such judgment or decree in any such civil action as may be necessary or appropriate to enforce obedience to any such subpoena or order.

(b) The Senate Select Committee on Presidential Campaign Activities shall have authority to prosecute in its own name or in the name of the United States in the District Court of the United States for the District of Columbia any civil action heretofore or hereafter brought by said Committee to enforce or secure a declaration concerning the validity of any subpoena or order heretofore or hereafter issued by said Committee to the President or Vice President or any other officer of the United States or any officer or employee of any department of the United States to procure the production before the said Committee of any information, documents, taped recordings, or other materials relevant to the matters the Committee is authorized to investigate, and pray the said District Court to enter such judgment or decree in said civil action as may be necessary or appropriate to enforce any such subpoena or order.

(c) The Senate Select Committee on Presidential Campaign Activities may be represented by such attorneys as it may designate in any action prosecuted by said Committee under this Act.

The SPEAKER. Is a second demanded? Mr. MCCLORY. Mr. Speaker, I demand a second.

The SPEAKER. Without objection, a second will be considered as ordered.

There was no objection.

Mr. KASTENMEIER. Mr. Speaker, I yield myself such time as I may consume.

The purpose of S. 2641 is to confer upon the U.S. District Court for the District of Columbia jurisdiction over civil actions brought by the Senate select committee on Presidential campaign activities to enforce—or secure a declaration concerning the validity of—any subpoena or order issued by the select committee to the President, Vice President or other Federal officer for the production of information relevant to the committee's function. The select committee is given authorization to prosecute such actions to enforce—or secure a declaration concerning the validity of—such subpoenas and orders heretofore or hereafter issued by it, and may be represented by such attorneys as it may designate in any action under this act.

S. 2641 was introduced by Senator ERVIN, chairman of the Senate Select Committee on Presidential Campaign Activities on November 2, 1973, and was cosponsored by all the committee members. It passed the Senate in amended form on November 9, 1973.

The legislation is needed because, on October 17, 1973, Judge John J. Sirica of the U.S. District Court for the District of Columbia dismissed an action brought by the select committee to enforce its subpoenas requesting certain tape recordings which were in the possession of the President. The dismissal followed a finding that there is no statute upon which

the suit could be based. Judge Sirica stated in his opinion:

The Court has been requested to invoke a jurisdiction which only Congress can grant but which Congress has heretofore withheld.

S. 2641 would provide the necessary jurisdiction to the district court.

As respects the procedure chosen by the select committee, Judge Sirica observed that the select committee deliberately chose not to attempt an adjudication of the matter by resort to a contempt proceeding under title 2, United States Code, section 192, or via congressional common law powers which permit the Sergeant at Arms forcibly to secure attendance of the offending party, and that the select committee declared that either method would be "inappropriate" and "unseemly."

In dismissing the select committee's suit for lack of jurisdiction, Judge Sirica pointed out that in light of this lack of jurisdiction he did not reach the problem of justifiability or the merits of the case before him. It is important to note that enactment of S. 2641 will supply lacking jurisdiction but it will leave unresolved any issue of justifiability or any issue on the merits.

As originally introduced, S. 2641 was broader in scope than the measure that passed the Senate and is now before us. It would have given every congressional committee power to bring comparable suits. The present measure results from an amendment in the nature of a substitute introduced by Senator ERVIN at the suggestion of Senator FLORES and approved by all members of the select committee, which restricts the application of the bill to subpoenas and orders of the select committee.

Although the select committee may eventually prevail in the pending litigation, it is desirable that the question of jurisdiction be resolved now by legislation needed to enable the select committee to obtain information related to its investigation. For the same reason, the Committee on the Judiciary does not at this time make any recommendation concerning H.R. 11189, a bill identical to S. 2641 as introduced. The committee does not wish to sustain the delay that enactment of a broader bill might entail.

Let me repeat: The bill creates jurisdiction in the district court over suits brought by the Ervin committee for enforcement of its subpoenas or adjudication of their validity and it authorizes the committee to sue for such enforcement or adjudication. That is all the bill does.

Here is what the bill does not do:

It does not apply to any committee other than the Ervin committee.

It does not deal with justifiability or other issues on the merits.

It does not entail expense.

It was adopted by the Senate and by the Judiciary Committee without dissenting voice.

Mr. Speaker, I urge favorable consideration of S. 2641.

Mr. GROSS. Mr. Speaker, will the gentleman yield?

Mr. KASTENMEIER. I yield to the gentleman from Iowa.

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Mr. GROSS. Mr. Speaker, the authority that this would give to the Senate select committee, when would that expire? Would it end with the expiration of the committee, or is there any expiration date?

Mr. KASTENMEIER. It would expire with the expiration of the committee. We are told that the committee is due to expire February 28, 1974.

Mr. GROSS. Mr. Speaker, I thank the gentleman.

Mr. MCCLORY. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, I had considered opposing this legislation. I certainly want to question the wisdom of its enactment. The great interest and excitement which surrounds the Senate Watergate Committee, may lead many to conclude that anything emanating from that committee is supposed to be sacrosanct and should yield to immediate support.

Mr. Speaker, I would like to call attention to the fact that many Presidents have been subpoenaed and, have been served with subpoenas and subpoenas duces tecum ever since the time of George Washington by committees of the Congress. In the late President Truman's letter to a committee of Congress declining to honor a subpoena, he called attention to the fact that subpoenas and subpoenas duces tecum had been issued to Presidents Washington, Jefferson, Monroe, Jackson, Tyler, Polk, Fillmore, Buchanan, Lincoln, Grant, Hayes, Cleveland, Theodore Roosevelt, Coolidge, Hoover, and Franklin D. Roosevelt, without the need for any such legislation as we have here today.

The Congress has always had ample power to enforce its own subpoenas, and as the gentleman on the other side of the aisle who sponsors this legislation has brought out, we certainly have that authority right now, and this enforcement can be compelled by the Sergeant at Arms through our common law authority or through sections 192 and 194, title 2, United States Code.

I raise two primary questions regarding this legislation. One is that it is probably unnecessary because the Senate Watergate Committee has deferred its further activities and probably will not reconvene until they get together to write a report; and clearly, it is unprecedented. It works contrary to the role of the judiciary in our constitutional system.

This legislation places unfettered discretion in four Members of the other body to issue any subpoenas or orders which it believes necessary for its investigative purpose and to direct subpoenas to the President, the Vice President and other officers of the United States as they see fit.

As I understand the existing provisions of title 2 of the United States Code, sections 192 and 194, and as we all know, the full House and Senate have consistently considered and occasionally debated at great length measures authorizing the Speaker of the House or the President pro tempore of the Senate to certify contempt proceedings to the proper U.S. attorney for action by the grand jury. Under this procedure, each body is permitted to screen the activities of committees.

I believe this check serves a valid purpose. We are being asked to forego this check and vest unprecedented authority in the Senate select committee. I would like to seriously caution the House against setting such a precedent.

Mr. Speaker, I firmly believe that the Congress should enforce its own process. The Senate select committee made no attempt to try to use established procedures for enforcing compliance, but instead is asking us to place the court in this difficult and unwanted position. I am referring to refereeing a dispute between the executive and legislative branches of the Government.

To permit the court to function in such a capacity raises in my mind a serious constitutional question in regard to article III, section 2, which requires that the Federal court's jurisdiction be limited to "cases and controversies." This question involves a complicated specialty of Federal jurisdiction. I would like to point out that hearings on this bill were not held in the other body nor were hearings held in this body.

Finally, Mr. Speaker, I fail to understand the urgency of this legislation, when the Senate select committee has postponed any further hearings until next year and, according to newspaper accounts, the select committee may be out of business altogether.

Mr. Speaker, I seriously question the need for enactment of this legislation, and I question, also, the wisdom of our taking any such action.

Mr. MCCLORY asked and was given permission to revise and extend his remarks.

THE SPEAKER pro tempore. Does the gentleman from Wisconsin (Mr. KASTENMEIER) desire to yield time?

Mr. KASTENMEIER. Not at this time, Mr. Speaker.

Mr. MCCLORY. Mr. Speaker, I yield 5 minutes to the gentleman from Illinois (Mr. RAILSBACK).

Mr. RAILSBACK. Mr. Speaker, I rise in support of S. 2641, which confers jurisdiction upon the District Court of the United States for the District of Columbia over certain civil actions brought by the Senate Select Committee on Presidential Campaign Activities. I am advised that the Department of Justice has no objections to this bill.

Frankly, I had some questions about this bill when I first heard about it, but I think there is a valid reason for it.

Presently Congress has two methods of forcing compliance with its subpoenas: One is its inherent common law authority; the other is its statutory authority under title 2, United States Code, sections 192 through 194. It is significant that both methods are forms of criminal contempt—and I emphasize the word "criminal."

S. 2641 provides a third remedy, which is civil in nature and very limited in its application.

Right now Congress has the common law power to conduct its own trial of the contempt of witnesses before its committees. A person adjudged in contempt of Congress under this procedure may, under an order of the particular House involved, be subjected to one of three things:

First. The individual who refused to

obey the subpoena can be required to be contained in close custody by the Sergeant at Arms.

Second. He can be committed to a common jail in the District of Columbia; or

Third. He can be kept by the Sergeant at Arms in close confinement in the guardroom of the Capitol Police.

Confinement under the common law procedure, as one can imagine, has not been used extensively. That means that it has become more common to utilize the statutory provisions contained in title 2, under section 192.

Now, here is what happens: here is the procedure, when we use section 192, which, we must remember, deals with civil contempt only and not criminal contempt:

It is required that the particular committee involved will certify to the President of the Senate or the Speaker of the House, if they are not in session, or to the body as a whole if in session that somebody has refused to obey one of its subpoenas.

Then the Speaker or the President problem is required to certify to a U.S. attorney the question of contempt.

The U.S. attorney then will present the matter to a grand jury. If the grand jury should return an indictment, then there would have to be a trial. Then if the individual subpoenaed, in this case the President of the United States, the Chief Executive of the United States, should be found guilty, it is required under section 192 that he would be punished by a fine of not more than \$1,000 nor less than \$100, and that he be imprisoned in a common jail for not less than 1 month nor more than 12 months.

Mr. MCCLORY. Will the gentleman yield to me?

Mr. RAILSBACK. Let me finish the theme of this first.

The idea is that in the case of the President of the United States the Senate select committee, comprised of all Members, including Republicans and Democrats, thought it would be unseemly to subject the President of the United States to that kind of an alternative, and I am inclined to agree with them. I now yield to the gentleman from Illinois.

Mr. MCCLORY. I thank the gentleman for yielding.

I would like to ask this: It seems to me since that the existing legislation involves a criminal proceeding and purports to charge the President with the commission of a crime, as would be required under the existing statute and pursuant to the actions that have been initiated by the Senate select committee, this House should be assuming jurisdiction. Indeed, the entire action of the Senate select committee seems to be directed against the President of the United States.

In other words, it seems to me that our House Judiciary Committee's inquiry into the question as to whether or not impeachable offenses have been charged against the President establishes that the proper forum is the House of Representatives.

If we enact this legislation, it vests further authority in the Senate select



committee to assume this role and to usurp our authority to investigate the various charges against the President and enables them to go forward with this activity. I think that is quite inappropriate.

The SPEAKER. The time of the gentleman has expired.

Mr. McCLOERY. I yield the gentleman 2 additional minutes.

Mr. RAILSBACK. Let me respond. I may not agree with all of the activities of the select committee, but let us not deceive ourselves; they did subpoena certain documents and requested certain information, including tapes. Those were not turned over voluntarily by the President of the United States. The court ordered that they had to be produced in the case of the Special Prosecutor, but as far as the Senate select committee is concerned it said they did not have jurisdiction to demand that they be produced.

Let me make it clear that the two devices used now for getting the President to turn over documents, if he should refuse to do so, provides for criminal contempt. Let me make it clear that this bill provides for civil contempt. That is one of the purposes of this bill.

Mr. McCLOERY. The House Judiciary Committee would not be hamstrung by any limitation under existing law insofar as its inquiry is concerned, would it?

Mr. RAILSBACK. As far as I know, we have not even begun the inquiry. As I understand it, you have only these two devices, both of which are criminal in nature.

Mr. McCLOERY. And they would be available to us?

Mr. RAILSBACK. Yes; except that you have to go to the U.S. attorney, and then it goes to a grand jury process and trial. If that trial should hold against the President of the United States, he has to be confined in jail for 1 month under that statute, which the committee does not want to go through.

Mr. McCLOERY. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, there seems to be a popular demand for legislation to enlarge the authority and expand the activities of the Senate Watergate committee. The question in my mind is whether they are implying upon the rightful role of the House of Representatives in connection with their present inquiry. The excuses they give for not exercising the subpoena power already granted by statute is that they regard the existing remedies as unseemly. It appears to me that they may indeed be unseemly, but that does not seem to me to justify some extraordinary temporary remedy just because of the popularity of the activities of this committee which have been publicized so much on television and in the press.

I regard it as a bad precedent for us to capitulate on constitutional issues—and on matters of principle when such circumstances exist. The Senate committee has statutory remedies at the present time, and if they are not sufficient and the charges against the President are so serious as to require subpoenas duces tecum against the President, it seems to me that the House itself

ought to exercise the authority it has under the constitutional authority of impeachment, and not to surrender this function to this select committee of the Senate to try the President before we have undertaken our investigation to determine the existence or absence of so-called impeachable offenses.

(Mr. McCLOERY asked and was given permission to revise and extend his remarks.)

Mr. KASTENMEIER. Mr. Speaker, I have no further requests for time.

Mr. RODINO. Mr. Speaker, I rise in support of S. 2641. What this bill does is to give the Senate and its Select Watergate Committee their day in court. If the situation were reversed and a House Select Committee were being frustrated in the enforcement of its subpoenas because of the alleged lack of a duly authorized and appropriate forum for determination of their validity, I am sure we would all hope that the Senate would support our efforts to supply the lack.

As I understand it, Judge Sirica in the District Court dismissed the Watergate Committee's suit to enforce or determine the validity of its subpoenas. In so doing Judge Sirica declined to decide a whole host of issues, including such issues as justifiability, executive privilege, and the like, because he regarded the absence of a statute granting jurisdiction to the court as conclusive. The decision is pending on appeal. Meanwhile, enactment of S. 2641 would restore these issues to adjudication by supplying the lacking jurisdiction. The measure empowers the U.S. District Court for the District of Columbia to entertain actions to enforce or validate Watergate Committee subpoenas and authorizes the committee to use that court to litigate the enforcement and enforceability of its subpoenas.

The urgency of perfecting the authority of the select committee is evident. The committee cannot perform its investigative function if it cannot enforce its subpoenas. Enactment of S. 2641 is needed to remove the threshold obstacle to a determination of the substantive issues which Judge Sirica declined to decide.

Pursuant and conclusion of the Watergate investigation is critical to the restoration of our people's confidence in the Federal Government. It is unthinkable that the Senate Select Committee should be denied a determination of the enforceability of its subpoenas simply because Congress has failed to provide a forum. We should enact S. 2641 at once.

Mr. BROOKS. Mr. Speaker, I do not intend to oppose the motion, but I have misgivings concerning this legislation which would authorize the Senate Select Committee on Presidential Campaign Activities to commence a civil action in the U.S. District Court for the District of Columbia for the enforcement of its subpoena for the production of certain materials, including tapes of conversations, in the possession of the President.

The measure involves certain basic constitutional problems which were not given adequate consideration either in the Senate, where the bill was amended and adopted without being referred to committee, or here in the House, where the bill was favorably reported by our

Judiciary Committee without hearings or extensive consideration.

The Joint Committee on Congressional Operations, of which I am vice chairman, has been conducting a detailed study of litigation affecting the Congress, including the issuance of congressional subpoenas and their enforcement.

Many of us on the committee have been concerned over the increasing tendency of the courts to entertain litigation involving the judicial review of legislative decisions.

S. 2641 invites the courts to enter legislative areas by a congressional committee seeking a decision of the court passing on the validity of a congressional subpoena. It also establishes the precedent of giving standing to sue to a Senate committee and authorizing it to employ its own counsel to commence a civil action either in the name of the committee or the name of the United States.

When a legislative body appears before the courts as a party litigant, it appears to concede the superiority of the judicial branch in becoming a suppliant before it. This is in derogation of the autonomy and independence of the legislative branch and is an undesirable precedent.

Both the House and the Senate possess the subpoena power, and the contempt power. In fact, the Senate Campaign Activities Committee did issue and serve a subpoena on the President for the production of certain documents, including tapes of conversations, in the possession of the President. The proper proceeding to enforce a subpoena against a recalcitrant witness is on order of the Senate to the Sergeant-at-Arms, in this case, to apprehend any person defying the order of the Senate and to bring him before the bar of the Senate to show cause why he should not be held in contempt of the Congress.

An alternative method of enforcement is to proceed under title 2 United States Code sec. 192, by referring the proceedings involving the contempt to the U.S. Attorney for prosecution as a misdemeanor. The latter proceeding would seem to be impractical because the U.S. Attorney and the Department of Justice would be requested to proceed against their superior, the President.

It is probable that it would be difficult to achieve a consensus of the Senate to proceed in the abrupt fashion suggested first, namely, the apprehension of the contemptuous official. This contempt power of the Senate was last employed in 1935 in *Jurney v. McCracken*, 294 U.S. 125.

The question necessarily arises what would happen, even if this bill becomes law over a presidential veto, if the President should choose to disregard a declaratory judgment of the District Court. If he declines to comply with a Senate subpoena, why should he do otherwise with respect to a declaratory judgment of a district judge?

The foregoing sketchy discussion, at this point, serves only to indicate the serious constitutional problems underlying the bill which deserve penetrating study by the Congress.

The SPEAKER. The question is on the motion offered by the gentleman

December 3, 1973

CONGRESSIONAL RECORD — HOUSE

H 10487

from Wisconsin (Mr. KASTENMEIER) that the House suspend the rules and pass the Senate bill S. 2641.

The question was taken; and (two-thirds having voted in favor thereof) the rules were suspended and the Senate bill was passed.

#### GENERAL LEAVE

Mr. KASTENMEIER. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days in which to revise and extend their remarks on the Senate bill, S. 2641, just passed.

The SPEAKER pro tempore. (Mr. McFALL). Is there objection to the request of the gentleman from Wisconsin?

There was no objection.

#### POSTPONEMENT OF HEADSTART FEE SCHEDULE

Mr. PERKINS. Mr. Speaker, I move to suspend the rules and pass the bill (H.R. 11441) to postpone the implementation of the Headstart fee schedule.

The Clerk read as follows:

H.R. 11441

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the last sentence of section 222(a)(1) of the Economic Opportunity Act of 1964 is amended to read as follows: "The Secretary shall defer the implementation of a fee schedule established under this paragraph until July 1, 1975."

The SPEAKER pro tempore. Is a second demanded?

Mr. STEIGER of Wisconsin. Mr. Speaker, I demand a second.

The SPEAKER pro tempore. Without objection, a second will be considered as ordered.

There was no objection.

Mr. PERKINS. Mr. Speaker, I yield myself 5 minutes.

(Mr. PERKINS asked and was given permission to revise and extend his remarks.)

Mr. PERKINS. Mr. Speaker, I would like to take this opportunity to first, congratulate our colleague from California (Augustus F. Hawkins), chairman of the Equal Opportunities Subcommittee for his very prompt and responsive action to deal with the problem of the Headstart fee schedule. The bill was reported from the committee unanimously by voice vote and has strong bipartisan support.

The bill before us today is very simple. Upon enactment the Secretary of Health, Education and Welfare is directed to defer the implementation of the fee schedule for the Headstart program until July 1, 1975.

The Economic Opportunity Act Amendments of 1972 required the Secretary of Health, Education and Welfare to establish a schedule of fees for the Headstart program. It was my judgment that this fee schedule would have resulted in allowing those families who exceed the income limitation of the act to participate in the Headstart program

at a nominal cost. This expectation is consistent with the way the Headstart program has been run in the past, and I anticipated the Headstart program to expand to include more of the near poor. What has happened is that those previously eligible for participation in the program are now being asked to pay a fee and they are being forced to drop out because they are unable to pay these fees.

The committee has been advised by the Office of Child Development that there has been an increase in administrative problems since the introduction of the fee schedule. Some local Headstart programs are refusing to collect fees. In other programs the fee schedule has caused friction between the poor and the near poor and the cost of collecting the fees are actually far greater than the fees being collected.

Therefore, Mr. Speaker, this bill accomplishes two worthwhile goals. First, it postpones the fee schedule until the Congress has an opportunity to hold some additional hearings in light of the experience we gained; and second, it restores the program to its former successful operation.

It is my judgment that the Secretary of Health, Education, and Welfare should immediately inform all Headstart programs that the regulations of August 1973 which imposed the fee schedule are due to be rescinded and he should cease any activities with regard to collecting fees that may have been assessed while the fee schedule was in effect.

Mr. Speaker, I know of no objection to the postponement of the fee schedule. It will make the program work better and will bring about more participation.

Mr. STEIGER of Wisconsin. Mr. Speaker, I yield myself such time as I may consume.

(Mr. STEIGER of Wisconsin asked and was given permission to revise and extend his remarks.)

Mr. STEIGER of Wisconsin. Mr. Speaker, let me make sure that it is clear that passage of this bill to postpone the establishment of the Headstart fee schedule in no way should be taken or read as opposition per se to the concept of a fee schedule. Rather, it is an effort to give both the Congress and the administration more time in which to more carefully calculate exactly what the effect is going to be when we establish this kind of fee schedule.

I think the bill is a good one and it ought to be supported.

Mr. Speaker, considerable concern from various quarters has accompanied the implementation of the Headstart Fee Schedule, instituted in August of this year. The schedule imposes a monthly fee on the participants in the program who come from families with annual incomes above the defined poverty level of \$4,320.

The concept of the fee schedule was originally proposed within the context of the comprehensive child development bill as a means of opening the legislation to children of all backgrounds. That proposal was incorporated into the Equal Opportunity Act Amendments of 1972. Following the Presidential veto of the bill, the child development section was

deleted during reconsideration, but the fee schedule was retained and attached to the Headstart program.

The pursuant application of the fee schedule has sparked a sizable controversy among those who felt it to be an inappropriate attachment to a program oriented to the poverty sector, such as Headstart.

Since the participation of the non-poor in the Headstart program has been limited to 10 percent of all participants, only a small minority of those enrolled in the program are affected by the fees. This arrangement has apparently fostered resentments and caused some friction between the participants on opposite sides of the poverty line.

There are strong indications that non-poor parents whose children were previously eligible for the program are now hesitant to enroll their children in Headstart because of a fee which they consider to be exorbitant. Consequently, there has been an estimated 50 percent dropoff in the enrollment of children from nonpoor families. At this point, parental income, and not the child's needs, becomes the prime determinant in program enrollment, a situation which runs counter to the goals of Headstart.

Aside from the problems which the fee schedule has created for some participants, the value of the schedule to the program itself has also proved questionable. Preliminary evidence from the Office of Child Development indicates that the cost of administering the fee schedule has proven to be greater than the fees collected. Because of the difficulties they have encountered, it has been reported that several Headstart units have abandoned their efforts to collect the fees entirely.

The objective of the fee schedule to create extra funding for local Headstart projects is clearly not being achieved. Indeed, by forcing lower income families who are nonetheless above the stated poverty line to remove their children from the program, the current application of the fee schedule seems to be counterproductive.

This set of conditions recommends a postponement of the fee schedule until an extensive review of the merits and drawbacks of this concept and its effects on the Headstart program can be completed. H.R. 11441 will allow the Education and Labor Committee to undertake this task.

Mr. Speaker, I reserve the balance of my time.

Mr. PERKINS. Mr. Speaker, I yield such time as he may consume to the distinguished gentleman from Washington (Mr. MEANS) who has put in a great deal of work on this piece of legislation.

(Mr. MEANS asked and was given permission to revise and extend his remarks.)

Mr. MEANS. Mr. Speaker, I first became aware of the problems inherent in the Headstart fee schedule implementation when a number of concerned Indian parent groups contacted me.

The problems of implementation being cited for all Headstart programs are particularly acute for those operated on and

93d CONGRESS } HOUSE OF REPRESENTATIVES { REPORT  
 1st Session } No. 93-661

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**CONFERRING JURISDICTION ON THE U.S. DISTRICT COURT FOR THE  
 DISTRICT OF COLUMBIA OF CERTAIN CIVIL ACTIONS BROUGHT  
 BY THE SENATE SELECT COMMITTEE ON PRESIDENTIAL CAM-  
 PAIGN ACTIVITIES**

NOVEMBER 26, 1973.—Committed to the Committee of the Whole House on the  
 State of the Union and ordered to be printed

Mr. KASTENMEIER, from the Committee on the Judiciary,  
 submitted the following

**REPORT**

[To accompany S. 2641]

The Committee on the Judiciary, to whom was referred the bill (S. 2641) to confer jurisdiction upon the district court of the United States of certain civil actions brought by the Senate Select Committee on Presidential Campaign Activities, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

**PURPOSE**

The purpose of S. 2641 is to confer upon the United States District Court for the District of Columbia jurisdiction over civil actions brought by the Senate Select Committee on Presidential Campaign Activities to enforce or secure a declaration concerning the validity of any subpoena or order issued by the Select Committee to the President or other Federal officer for the production of information relevant to the Committee's function. The Select Committee is given authority to prosecute such actions to enforce or secure a declaration concerning the validity of such subpoenas and orders heretofore or hereafter issued by it, and may be represented by such attorneys as it may designate in any action under this Act.

**STATEMENT**

S. 2641 was introduced by Senator Sam J. Ervin, Jr., Chairman of the Senate Select Committee on Presidential Campaign Activities on November 2, 1973 and was cosponsored by all the Committee members. It passed the Senate in amended form on November 9, 1973.

The legislation is needed because, on October 17, 1973, the U.S. District Court for the District of Columbia dismissed an action brought by the Select Committee to enforce its subpoenas requesting certain tape recordings which were in the possession of the President. The dismissal followed a finding that there is no statute upon which the suit could be based. Judge John J. Sirica stated in his opinion, "The Court has here been requested to invoke a jurisdiction which only Congress can grant but which Congress has heretofore withheld." S. 2641 would provide the necessary jurisdiction to the District Court.

As respects the procedure chosen by the Select Committee, Judge Sirica observed that the Select Committee deliberately chose not to attempt an adjudication of the matter by resort to a contempt proceeding under Title 2, U.S.C. § 192, or via congressional common law powers which permit the Sergeant at Arms forcibly to secure attendance of the offending party, and that the Select Committee declared that either method would be "inappropriate" and "unseemly."

In dismissing the Select Committee's suit for lack of jurisdiction, Judge Sirica pointed out that in light of this lack of jurisdiction he did not reach the problem of justiciability or the merits of the case before him. It is important to note that the same is true of S. 2641. Enactment of the bill will supply lacking jurisdiction but it will leave unresolved any issue of justiciability or any issue on the merits.

As originally introduced, S. 2641 was broader in scope than the pending measure that passed the Senate. It would have given every congressional committee power to bring comparable suits. The present measure results from an amendment in the nature of a substitute introduced by Senator Ervin at the suggestion of Senator Hruska and approved by all members of the Select Committee, which restricts the application of the bill to subpoena and orders of the Select Committee.

We are advised that the Select Committee must respond to the Court of Appeals by November 28, 1973 in its appeal of the ruling of the District Court. We are of the view that although the Select Committee may eventually prevail in the pending litigation, it is desirable that the question of jurisdiction be resolved now by legislation needed to enable the Select Committee to obtain information related to its investigation. For the same reason, the Committee on the Judiciary does not at this time make any recommendation concerning H.R. 11189, a bill identical to S. 2641 as introduced. The Committee does not wish to undergo the delay that enactment of a broader bill might entail.

The Committee recommends enactment of S. 2641.

#### COST TO THE UNITED STATES

No cost to the United States is entailed by the enactment of S. 2641.

#### NO RECORD VOTE

The legislation was ordered reported at a meeting of the Committee on the Judiciary held on November 26, 1973. No record vote was taken during the Committee's deliberations. Motion to report S. 2641 favorably to the House without amendment was passed without dissent.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL )  
CAMPAIGN ACTIVITIES, suing in its own )  
name and in the name of the UNITED )  
STATES, )

and )

SAM J. ERVIN, JR.; HOWARD H. BAKER, JR.; )  
HERMAN E. TALMADGE; DANIEL K. INOUE; )  
JOSEPH M. MONTOYA; EDWARD J. GURNEY; ) Civil Action No. 1593-73  
and LOWELL P. WEICKER, JR., as United )  
States Senators who are members of )  
the Senate Select Committee on )  
Presidential Campaign Activities )

Plaintiffs )

v. )

RICHARD M. NIXON, individually and as )  
President of the United States )

Defendant )

AMENDED ANSWER

Richard M. Nixon, answering the amended complaint filed  
in the above-styled cause, states as follows:

1. Admits the allegations contained in paragraph one of the  
complaint, but denies that plaintiffs acted within their authority  
in issuing the subpoenas duces tecum to the President of the  
United States and thereafter in instituting this action.

2. Denies the allegation contained in paragraph two of  
the complaint.

3. Admits the allegations contained in paragraph three  
of the complaint, but denies that plaintiffs are entitled to  
investigate criminal conduct; and further denies that plaintiffs  
are empowered to bring suit against the President of the  
United States.

4. Admits the allegations contained in paragraph four of the complaint.

5. Admits the allegations contained in paragraph five of the complaint, but denies that the President of the United States can be sued in his official capacity; and further denies that he can be sued individually for acts performed in his official capacity.

6. Denies the allegations contained in paragraphs six through nine of the complaint.

7. Admits the allegations contained in paragraph nine "a" that Public Law 39-190 ostensibly confers jurisdiction upon this court but denies that the subject matter is justiciable.

8. Denies the allegations contained in paragraph ten of the complaint.

9. Admits the allegations contained in paragraph eleven, but denies that plaintiffs are empowered to subpoena materials from the President of the United States.

10. Admits the allegations contained in paragraphs twelve through fifteen of the complaint.

11. Admits the allegation contained in paragraph sixteen of the complaint, but denies that any court has jurisdiction to quash, modify, or narrow a subpoena issued by a Committee of Congress.

12. Admits the allegations contained in paragraph seventeen of the complaint.

13. Alleges that he is without information or knowledge sufficient to form a belief as to the allegations contained in paragraph eighteen of the complaint, and denies that he has conceded the relevancy of any "tapes" to plaintiffs' investigation.

14. Admits the allegations contained in paragraph eighteen "a" of the complaint.

15. Denies the allegations contained in paragraphs nineteen through twenty-five of the complaint.

In further defense to the complaint, Richard M. Nixon states as follows:

First Defense

That the complaint fails to state a claim upon which relief can be granted.

Second Defense

That this Court lacks jurisdiction over the person of Richard M. Nixon in this action, either individually or as President of the United States.

Third Defense

That this action presents no justiciable controversy as required by Article III of the United States Constitution, and 28 U.S.C. 2201 and 2202.

Fourth Defense

That Senate Resolution 60, 93rd Cong., 1st Sess. (1973), purports to authorize an investigation of alleged criminal conduct, and that upon information and belief the investigation by plaintiffs has been, in fact, a criminal investigation and trial conducted for the purpose of determining whether or not criminal acts have been committed and the guilt or innocence of individuals, which Resolution and investigation exceed the legislative powers granted to the Congress in Article I of the Constitution.

Fifth Defense

That the subpoena duces tecum attached as Exhibit D to the complaint is so unreasonably broad and oppressive as to make compliance impossible.

Sixth Defense

That the relief sought by plaintiffs constitutes an unconstitutional attempt to interfere with the confidentiality of private records of conversations between the President of the United States and his closest advisers relating to the official duties of the President.

Seventh Defense

That it is both common knowledge in the community and capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, and thus may be judicially noticed by this Court, that the Senate Select Committee served three additional subpoenas, sixty-eight pages in length and returnable January 4, 1974, calling on the President to produce hundreds of tapes and documents. When considered in conjunction with the subpoenas which are the subject of the instant litigation, it is clear that such a massive invasion of the White House constitutes "wholesale public access to Executive deliberations and documents" tending to "cripple the Executive as a co-equal branch."

WHEREFORE, premises considered, the relief prayed for should be denied.

Respectfully submitted,

J. FRED BUZHARDT  
JAMES D. ST. CLAIR  
CHARLES ALAN WRIGHT  
ROBERT T. ANDREWS  
THOMAS P. MARINIS, JR.

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Of Counsel

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GEORGE P. WILLIAMS



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL	)
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	)
and	)
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HERMAN E. TALMADGE; DANIEL K. INOUE;	)
JOSEPH M. MONTOYA; EDWARD J. GURNEY;	)
and LOWELL P. WEICKER, JR., as United	)
States Senators who are members of	)
the Senate Select Committee on	)
Presidential Campaign Activities	)
	)
	)
<u>Plaintiffs</u>	)
	)
v.	)
	)
RICHARD M. NIXON, individually and as	)
President of the United States	)
	)
	)
<u>Defendant</u>	)

Civil Action No. 1593-73

RESPONSE TO PLAINTIFFS'  
MEMORANDUM ON REMAND

J. FRED BUZHARDT  
JAMES D. ST. CLAIR  
CHARLES ALAN WRIGHT  
ROBERT T. ANDREWS  
THOMAS P. MARINIS, JR.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL )  
CAMPAIGN ACTIVITIES, suing in its own )  
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STATES, )

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SAM J. ERVIN, JR.; HOWARD H. BAKER, JR.; )  
HERMAN E. TALMADGE; DANIEL K. INOUE; )  
JOSEPH M. MONTOYA; EDWARD J. GURNEY; ) Civil Action No. 1593-7;  
and LOWELL P. WEICKER, JR., as United )  
States Senators who are members of )  
the Senate Select Committee on )  
Presidential Campaign Activities )

Plaintiffs )

v. )

RICHARD M. NIXON, individually and as )  
President of the United States )

Defendant )

RESPONSE TO PLAINTIFFS'  
MEMORANDUM ON REMAND

This action was originally filed by plaintiffs on August 9, 1973. Richard M. Nixon answered on August 29, 1973, and plaintiffs immediately filed a motion for summary judgment. The matter was fully briefed and submitted to this Court, Chief Judge John J. Sirica presiding, on October 4, 1973. After full consideration, the Court dismissed plaintiffs' complaint and this action for failure to allege a statutory grant of subject matter jurisdiction. The Court properly failed to rule on the other issues raised by Richard M. Nixon's answer, most importantly on whether Richard M. Nixon, as President of the United States, has a right under the Constitution to withhold information from the Congress when he determines the disclosure to be contrary to the public interest.

This Court's order was entered on October 17, 1973. Plaintiffs immediately filed notice of appeal and, at least initially, sought to have the matter treated expeditiously by the Court of Appeals. Plaintiffs subsequently withdrew their request for expeditious treatment in order to pursue the alternative course of seeking legislation to cure the jurisdictional defect of their original complaint. This legislation was subsequently passed in the form of Public Law 93-190.

On December 28, 1973, the Court of Appeals remanded this case to this Court "for further proceedings in light of Public Law 93-190 to be codified as 28 U.S.C. § 1364." On January 7, 1974, plaintiffs amended their complaint to include a jurisdictional allegation under Public Law 93-190. This remand and the amendment to plaintiffs' complaint places this matter before the court on plaintiffs' motion for summary judgment.

The decision of this Court on October 17 is the law of the case and establishes that jurisdiction is lacking under any of the bases relied on in the original complaint. The amended complaint adds a further claim of jurisdiction under Public Law 93-190. We have very serious doubts about the constitutionality of that statute. Although Congress has broad powers over the jurisdiction of the United States courts, it cannot make a political question justiciable nor can it alter the constitutional separation of powers. Those doubts about the constitutionality of the statute, however, relate so closely to our arguments on the merits that we shall develop them in that context and assume arguendo that this Court has jurisdiction of the subject matter under Public Law 93-190 if the case is justiciable at all.

I. Introductory Statement

By their motion for summary judgment, plaintiffs ask this Court to enter an order in the nature of a declaratory judgment pursuant to 28 U.S.C. § 2201 that two subpoenas duces tecum issued and served on the President must be complied with notwithstanding the fact that the President has interposed a claim of privilege as to materials covered by the subpoenas.

As we have stated in previous submissions, the President does not question the right and duty of the Congress to conduct investigations and he does not seek to thwart the investigation of the Senate Select Committee by refusing to comply with the subpoenas in question. In his letter of July 6, 1973, to the Chairman of the Committee, the President stated that he respected the responsibilities of the Committee and indicated that he was willing to cooperate with it within the bounds of the constitutional rights and powers of the Presidency. There has in fact been considerable cooperation on behalf of the President with the Committee's investigation. All of this cooperation, however, has been voluntary and it is the view of the President that it should remain voluntary if our constitutional traditions are to remain intact. It is for this reason, and this reason alone, that the President continues to resist the efforts of the Senate Select Committee to coerce disclosure of information the President deems contrary to the public interest.

The constitutional traditions to which the President refers have been well described by Professor Corwin in his detailed analysis of the Presidency.

In the many years that have rolled by since Jefferson's presidency there have been many hundreds of congressional investigations. But I know of no instance in which a head of a department has testified before a congressional committee in response to a subpoena or been held in contempt for refusal to testify. All appearances by these high officials seem to have been voluntary.

Corwin, The President: Office and Powers 1787-1957 113 (4th rev. ed. 1957). He restates his view at page 116:

In short, no one questions, or can question, the constitutional right of the houses to inform themselves through committees of inquiry on subjects that fall within their legislative competence and to hold in contempt recalcitrant witnesses before such committees, and undoubtedly the question of employee loyalty is such a subject. On the other hand, this prerogative of Congress has always been regarded as limited by the right of the President to have his subordinates refuse to testify either in court or before a committee of Congress concerning matters of confidence between them and himself. Are, then, communications to the President or to officials authorized by him to receive them concerning the loyalty of federal executive personnel such matters of confidence? The question must undoubtedly be answered in the affirmative.

The Committee violated this time-honored tradition when it issued the subpoenas in the face of the President's full explanation on July 23, 1973, of the reasons why he had determined that it would not be in the public interest to disclose the information that the Committee had requested.

Now the Committee urges this Court to violate another time-honored constitutional tradition -- that is, to embroil the Judiciary in what is essentially a confrontation between the Executive and Legislative Branches of this Government.

As our original submission reflects, the defects in plaintiffs' complaint were several. Plaintiffs have attempted to cure the most basic defect, the want of a statutory grant of jurisdiction, by reliance on Public Law 93-190. Public Law 93-190 is not, however, the end of plaintiffs' jurisdictional problems.

Article III, § 2 of the Constitution allows a federal court to act only in cases and controversies. By this terminology, the Constitution means an "actual controversy" of a justiciable nature. The classic statement of this constitutional requirement is by Chief Justice Hughes in Aetna Life Insurance Company of Hartford, Connecticut v. Haworth, 300 U.S. 227 (1937).

A "controversy" in this sense must be one that is appropriate for judicial determination. \*\*\* A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. \*\*\* The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. \*\*\* It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. \*\*\* Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. \*\*\* And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations that irreparable injury is threatened are not required.

300 U.S. at 240-241. Although the massive generalities of the Aetna case are quoted and requoted in later decisions, they are something less than a sure guide to decision.

"The considerations, while catholic, are not concrete."

McCahill v. Borough of Fox Chapel, 438 F.2d 213, 215

(3rd Cir. 1971). A better perception was stated for the Court by Justice Murphy in a later case.

The difference between an abstract question and a "controversy" \*\*\* is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941).

The President does not suggest that there is no controversy between the Committee and his office. He does suggest, however, that the controversy that exists, involving as it does a confrontation between two separate and co-equal branches of this Government, is inappropriate for judicial resolution by way of declaratory judgment. Resolution by this method would require this Court to interject itself between these two branches -- a role courts have understandably gone to great lengths to avoid. In the words of Justice Douglas, "the federal courts do not sit as an ombudsman refereeing disputes between the other two branches." Gravel v. United States, 408 U.S. 606, 640 (1972) (Douglas, J. dissenting).

II. This Matter Does Not Present A  
Justiciable Case or Controversy  
within the Meaning of  
Article III, § 2, of the Constitution

The deus ex machina of Public Law 93-190, upon which plaintiffs rely to overcome the jurisdictional obstacles to this unprecedented action, cannot be invoked to render this suit a justiciable controversy; for 28 U.S.C. § 1364 is merely a statutory grant of jurisdiction, and, thus, satisfies only one of the jurisdictional requirements set down by the Supreme Court in Powell v. McCormick, 395 U.S. 486, 512-513 (1969).

In Baker v. Carr \*\*\* we noted that a federal district court lacks jurisdiction over the subject matter (1) if the cause does not "arise under" the Federal Constitution, laws, or treaties (or fall within one of the other enumerated categories of Art. III); or (2) if it is not a "case or controversy" within the meaning of that phrase in Art. III; or (3) if the cause is not one described by any jurisdictional statute.



The Supreme Court in Powell had reference to the discussion of subject matter jurisdiction in Baker v. Carr, 369 U.S. 186, 198-199 (1962). This principle has been recently reaffirmed by the District of Columbia Circuit in United States Servicemen's Fund v. Eastland, (No. 24,279 August 30, 1973).

As the quotation from Powell indicates, entry into the federal court is like opening a safe deposit box, where two separate keys are required. For the federal courtroom door, the two essential keys are that the case be within the judicial power of the United States, as defined in Article III, § 2, of the Constitution, Hodgson v. Bowerbank, 5 Cranch (9 U.S.) 303 (1809), and that it be within a statutory grant of jurisdiction by the Congress, Cary v. Curtis, 3 How. (44 U.S.) 236, 245 (1845). See Wright, Federal Courts §§ 8, 10 (2d ed. 1970). Public Law 93-190 satisfies only this second requirement. To be properly in court they must also, to use the words of Senator Baker, "place a justiciable issue before the courts" (S. Tr. 5502) Hearings Before the Select Committee on Presidential Campaign Activities of the U.S. Senate, 93rd Congress, 1st Sess., bk. 7, at 2660 (1972). This they have failed to do.

The concept of justiciability as it has evolved through our constitutional history is well-described by the Supreme Court in Flast v. Cohen, 392 U.S. 83 (1968).

The jurisdiction of federal courts is defined and limited by Article III of the Constitution. In terms relevant to the question for decision in this case, the judicial power of federal courts is constitutionally restricted to "cases" and "controversies." As is so often the situation in constitutional adjudication, those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government. Embodied in the words "cases" and "controversies" are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the rôle assigned to

the judiciary in a tripartite allocation of power to answer that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine.

Justiciability is itself a concept of uncertain meaning and scope. Its reach is illustrated by the various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justiciable. Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action. Yet it remains true that "(j)usticiability is \*\*\*not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures\*\*\*" Poe v. Ullman, 367 U.S. 497, 508 (1961).

392 U.S. at 94-95 (footnotes omitted).

This matter raises problems of justiciability, primarily because it calls for adjudication of a political question.

In Marbury v. Madison, 1 Cranch (5 U.S.) 137, 164-166 (1803), Chief Justice Marshall expressed the view that the courts will not entertain political questions even though such questions may involve actual controversies. This rule was found to have particular force with regard to the Office of President.

By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political: they respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.

1. Cranch at 165-166.

Since that early statement by Justice Marshall in Marbury v. Madison, the courts have struggled to establish criteria that would enable them to identify and uniformly deal with political questions. Such criteria have been evasive. In Coleman v. Miller, 307 U.S. 433, 454-55 (1939), the Court noted that a political question may be identified by evaluating "the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for judicial determination\*\*\*."

It was not until Baker v. Carr, supra, however, that the Court finally succeeded in isolating and articulating a workable set of criteria for identifying an issue that presents a political question. The Court said:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217.

It is submitted that this matter, involving as it does a request by the Legislative Branch that this Court overrule a formal and legitimate invocation of executive privilege, poses a nonjusticiable political question of such magnitude that literally every single formulation or criterion established in Baker v. Carr is inextricably a part of the issue presented.

Plaintiffs, however, have chosen to ignore Baker v. Carr, insisting only that there exists no "textually demonstrable constitutional commitment" of executive privilege to the President. Despite this bald contention, it is clear that the Constitution does embody such a "textually demonstrable" commitment. Indeed, Professor Dash has stated that the plaintiffs "don't question the executive privilege power of the President,"<sup>1</sup> but only challenge what they consider to be an abuse in its invocation.<sup>2</sup> Such a concession to the Constitutional basis for executive privilege is significant and is clearly mandated by the provisions of Article II, §§ 1, 2 and 3.<sup>3</sup>

1 Transcript of Proceedings October 4, 1973 at 68 (hereinafter "Transcript").

2 This "abuse," as articulated by Professor Dash, is that this is an "assertion of executive privilege where the President personally is involved. In that particular case he is using executive privilege as a shield for his self-protection rather than protection of the presidency or executive privilege." (Transcript at 68). Such a distinction or "abuse" is no longer even an arguable position since the President has disclosed to the grand jury the tapes which are the subject of this suit. This is not to say, however, that the President now or ever has conceded that his formal and personal invocation of executive privilege is reviewable by the courts. The disclosure of the tapes to the grand jury, however, is a forceful refutation of the charge that the President is attempting to "hide behind" a claim of executive privilege.

3 The textually demonstrable commitments are contained in the § 1 grant of "executive power" solely to the President; and § 2 grant to the President of the right to require, free from any Senate review, advice from his principal executive officers; and the § 3 charges that the President deliver a State of the Union message and "take care that the laws be faithfully executed."

In addition, these explicit grants of power carry other powers along with them. The Supreme Court has stated:

It is true, that such a power, if it exists, must be derived from implication, and the genius and spirit of our institutions are hostile to the exercise of implied powers. Had the faculties of man been competent to the framing of a system of government which would have left nothing to implication, it cannot be doubted that the effort would have been made by the framers of the Constitution. But what is the fact? There is not in the whole of that admirable instrument a grant of powers which does not draw after it others, not expressed, but vital to their exercise; not substantive and independent, indeed, but auxiliary and subordinate.

Equally significant is the curious refusal by the plaintiffs even to consider the applicability of the other five indicia of a political question articulated in Baker v. Carr.

This failure undoubtedly results from plaintiffs' misplaced reliance on the decision of the United States Court of Appeals for the District of Columbia in Nixon v. Sirica (Nos. 73-1962, 73-1967, 73-1989, Oct. 12, 1973). Admittedly, the Court of Appeals held the courts have the power to review a claim of Presidential privilege over matters subpoenaed by a grand jury. The Court of Appeals went to great lengths to emphasize "the narrow contours of the problem" with which it was faced and the fact that the decision was strictly limited to the "entirely unique circumstances of the case." Indeed, the exception promulgated there depends entirely upon "the grand jury showing that the evidence is directly relevant to its decisions."

Grand juries have traditionally been viewed as arms of the courts and courts are uniquely qualified to pass judgment on the needs of a grand jury. That was not the issue before the Court of Appeals in Nixon v. Sirica. Rather the issue was whether in determining the needs of the grand jury a court could compel the President of the United States to produce evidence he claimed was privileged for in camera inspection.

The Court of Appeals found that in these unique circumstances the courts had such a power and to protect the integrity of the grand jury were bound to exercise it. This finding, however, does not, as plaintiffs appear to suggest, impose a similar obligation on this Court. For here the circumstances are quite different. The Committee has made the political decision, albeit under color of law, to make an unprecedented demand on the President. The President

has considered the demand and made the political determination that compliance would be contrary to the public interest. The Committee has asked this Court to referee this dispute and to do so the Court must substitute its political judgment for both that of the President and the Committee and determine which of two co-equal branches of government should prevail.

The Court should decline this invitation. Acceptance could require this Court to substitute its judgment for that of the President in an area over which the President historically has exclusive and unreviewable power -- the invocation of executive privilege against the Congress. Such a privilege, inherent as it is in the constitutional grant of executive power, is a matter for Presidential judgment alone. The standards and circumstances that mandate its use are a function of Presidential judgment. Such judgments cannot be second-guessed and overruled at the caprice of the Senate Committee. Nor can they be evaluated and reviewed by any discernible criteria traditionally utilized by the courts in resolving constitutional disputes between individuals.<sup>4</sup>

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4 This distinction has been repeatedly noted by commentators, e.g., Douglas, Anatomy of Liberty 77 (1963); Younger, Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers, 20 U. Pitts.L.Rev. 755, 776(1959). A very recent commentator puts it this way: "The status of the party asserting the claim is obviously critical, as is the status of the entity against whom the claim is pressed. Putting aside all the difficulties involved in suing the President, eo nomine, there is an obvious difference between a claim by a coordinate branch and a claim by a private person that the allegedly unconstitutional usurpation also has caused him tangible injury. Apart from the greater ability of Congress to protect its jurisdiction by political means, it seems incongruous for Congress to request the courts to determine the extent and adequacy of congressional support of presidential action in an area of concurrent power." Erchnmeyer, The Separation of Powers: An Essay on the Vitality of a Constitutional Idea, 52 Ore. L.Rev. 211, 232 (1973).

The cases cited by the Committee in its Motion for Summary Judgment are not even remotely similar to the instant case, involving as they do controversies resolvable by judicial interpretation of a statute or the Constitution. Cf. Powell v. McCormick, 395 U.S. 486 (1969); United States v. Lovett, 328 U.S. 303 (1946); Humphrey's Executor v. United States, 295 U.S. 602 (1935). These were all cases in which the court was adjudicating, as courts traditionally do, a claim of individual rights. This is a compelling indicia of a political question as articulated in Baker v. Carr.

The matter of executive privilege against congressional demands, involving as it does subtle and exclusively Presidential judgments, is an area of decision-making where there are "considerations of policy, considerations of extreme magnitude, and certainly, entirely incompetent to the examination and decision of a court of justice." Ware v. Hylton, 3 Dall. (3 U.S.) 199, 260 (1796). It is this very "lack of judicially discoverable and manageable standards" for resolving the issue that further highlights the nonjusticiability of the question. It is respectfully submitted that this obvious absence of standards for review of the President's invocation of privilege is apparent upon analysis of the court's task in any in camera proceeding. As Professor Black so clearly explains,

The reason for maintenance of confidentiality may not, and sometimes will not, appear on the face of the submitted material but may lie in its context, outside the record. The President, in attempting to persuade the judge of the necessity for confidentiality, would thus often be forced to reveal more and more material beyond what had been subpoenaed, with no assurance that any of this material would remain confidential.

Black, Letter to the Editor, N. Y. Times, September 6, 1973,

Thus the Court is asked to make an initial policy determination that the President has improperly or mistakenly invoked executive privilege against the Congress. Such a determination by a court is constitutionally impermissible and violates the most basic tenets of the separation of powers. Moreover it is a determination beyond judicial abilities since the Court simply cannot substitute its judgment for that of the President. The impossibility of judicial resolution is underscored by the ancillary problem of the absence of standards for resolving the question. The teachings of Baker v. Carr are clear and compelling and require recognition of these indicia of nonjusticiability.

In Powell v. McCormick, supra at, 548-549 (1969), the Court determined that it could resolve the question presented without creating "a potentially embarrassing confrontation between coordinate branches" of the government because the resolution of the question of Representative Powell's right to be seated in Congress required no more than that the Court exercise its traditional role as interpreter of the Constitution. The decision required an interpretation of Congressional powers under Article 1, § 5, the type of interpretative function traditionally the responsibility of the Judicial Branch. The instant case cannot be so easily resolved. Contrary to the facts in Powell, there is no dispute in this case as to the President's constitutional power to invoke executive privilege. Many courts have so held and the Senate Committee itself recognizes the existence of an executive privilege. The Senate Committee, however, asks this Court to rule that the Legislative Branch has the responsibility and power to review the propriety of executive utilization of the privilege. Such a legislative power does not exist, and for this Court to hold to the contrary would be the most patent expression



of "lack of respect due a coordinate branch of government." Again, the teachings of Baker v. Carr apply and the true nature of the political question presented is made manifest.

In Committee for Nuclear Responsibility, Inc. v. Seaborg 463 F. 2d 788, 792 (D.C. Cir. 1971), a case upon which the Committee relies, the court clearly recognized that the government has an interest in avoiding disclosure of documents "which reflect intra-executive advisory opinions and recommendations whose confidentiality contributes substantially to the effectiveness of government decision-making processes." In Seaborg, the court considered only a claim of privilege by an "executive department or agency" and thus, despite the Committee's view that it controls here, Seaborg cannot be read as authoritative on the issue of a direct, personal claim of privilege by the Chief Executive.

It is submitted that the question before this Court poses the dilemma inherent in any nonjusticiable political question. The Court is being asked to resolve a direct clash of power between two branches of government. To resolve the confrontation the Court must necessarily declare that one power is greater than its counterpart and thus violate the very essence of separation of powers among the co-equal branches. Nothing could more clearly demonstrate "lack of respect due a coordinate branch of government," and nothing could more explicitly demonstrate the nonjusticiable nature of the present matter.

The Presidential decision to invoke executive privilege is by definition a political decision. It is a function of the President's position as Chief Executive. It involves, as we have demonstrated, a

complex blend of policy, perspective, and knowledge uniquely within the province of the President and Executive Branch. Neither the courts nor Congress can vouchsafe themselves the elements of knowledge and perspective necessary to examine and review such a decision. If the exclusive executive power conferred upon the President in Article II is to remain a meaningful constitutional allocation, neither the Court nor Congress can look behind this political decision already made by the President.

The Senate Committee invites this Court to create a constitutional confrontation destructive of the separation of powers. It is submitted, with respect, that such an invitation must be declined. The atmosphere of constitutional confrontation must be dissolved by this Court's "unquestioning adherence to the political decision already made." The unusual need for such adherence is further indicative of the nonjusticiable nature of the question presented.

It is submitted that this Committee's challenge to the invocation of executive privilege is merely the first such challenge that will occur if this Court issues the judgment requested. Recent events make it clear that the plaintiffs seek a favorable ruling in order to open the door to a wholesale invasion of executive confidentiality. On October 4, 1973, Professor Dash stated that:

We are not, as I have indicated, asking for any ruling by this Court that the President doesn't have executive privilege. He certainly does. We are saying that in a particular situation where we have identified the tapes by the tape, by the minutes of the conversation, where we already have by testimony indicated what was talked about during that period of time, and that we have made a prima facie case\*\*\*of possible criminality on the part of the President, that executive privilege clearly cannot be stated here.

Transcript at 25. It is obvious that plaintiffs are no longer content to confine themselves to a narrow, well-defined challenge to executive privilege. Indeed, the three most recent subpoenas calling for Presidential documents present requests so broad, so unprecedented, as to make impossible the formulation of any "judicially discoverable standards for resolving" a claim of executive privilege. The inevitable result will be this Court's participation with the Committee in what could become, in the words of the Court of Appeals, "wholesale public access to Executive deliberations and documents" that "would cripple the Executive as a co-equal branch." Nixon v. Sirica, supra at 26-27.

For these reasons, as well as the existence of all other indicia of a political question that adhere in this matter, the Court must hold the matter before it to be nonjusticiable.

### III. Plaintiffs Have Exceeded Their Legislative Authority Under the Constitution

#### A. Constitutional Limits

The power of the Congress to conduct investigations is inherent in the legislative process and is broad. Congress cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change. Therefore the power of inquiry is a necessary and appropriate attribute of the power to legislate. McGrain v. Daugherty, 273 U.S. 135, 175 (1927). However, this power of inquiry is not unlimited. Watkins v. United States, 354 U.S. 178, 187 (1956); United States v. Rumely 345 U.S. 41, 58 (1953) (Douglas, J., concurring); Marshall v. Gordon, 243 U.S. 521 (1917); Kilbourn v. Thompson, 103 U.S. 168 (1880).

The Senate Select Committee has asserted a broad mandate to "get to the bottom of widespread but incompletely substantiated suspicions of wrongdoing at the highest executive levels." Memorandum in Support of Motion for Summary Judgement (hereinafter "Memo.") at 15. In this action the movants have subpoenaed tape recordings and other materials in an effort to resolve the conflicting testimony adduced at the Senate hearings and thus determine "the precise extent of malfeasance in the executive branch." Memo. at 16. This inquiry is not germane to the Committee's legislative purpose, and indeed constitutes a usurpation of those duties exclusively vested in the Executive and the Judiciary.

The Senate Select Committee was established to investigate and study the extent to which illegal, improper, or unethical activities existed in the Presidential election of 1972 and related events, and to "determine whether in its judgment any occurrences \* \* \* revealed \* \* \* indicate the necessity or desirability of the enactment of new congressional legislation to safeguard the electoral process by which the President of the United States is chosen." S. Res. 60, 93rd Congress, 1st Sess. (1973). Accordingly, the Committee's mandate was to identify illegal, improper, or unethical activities and recommend corrective legislation, not to resolve the conflicts in the evidence and adjudicate questions of guilt or innocence. Such an inquiry is not germane to the Committee's legislative purpose, and is outside its charge. Clearly the movants can honor their legislative mandate without access to the tapes.<sup>5</sup>

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5 It should be noted that at least two members of the Committee, although joining in the present action, have acknowledged that production of the tapes is not essential to the legislative functions of the Committee. The Washington Post of September 10, 1973, p. A2, reported the following statement by Senator Daniel K. Inouye:

However, Congress is not a law enforcement or trial agency.

"I think we can proceed and file an adequate report without the tapes," said Inouye, a member of the Senate Watergate Committee.

"As far as I am concerned personally," he said on NBC's "Meet the Press" program, "this is where the difference between a legislative proceeding and a judicial proceeding comes in. If this were a criminal matter, I would say that the tapes are absolutely necessary and essential. But in our case I think we can proceed and file an adequate report without the tapes."

He was asked, "You personally don't care then who is telling the truth?"

"Because it is not our business to decide the guilt or innocence of any party this is my view." Inouye responded.

Senator Inouye was further asked, "Doesn't it matter to you in your final report whether you established who is telling the truth?"

He responded, "I said this was my personal view and this makes a difference between a legislative investigation and a criminal case. In a criminal case it would be absolutely essential. I would say the tapes be made available. But for the purpose of this committee I am certain the Committee report can be made."

Senator Gurney stated the following views when he was interviewed on Capitol Cloak Room on Sept. 16, 1973:

"Senator, if we can turn to the question of presidential tapes, do you think they are essential to the investigation that the Senate is conducting?"

"SENATOR GURNEY: No. No, I don't. What is our duty anyway? Our duty of course was to charter...", there are certain words unintelligible -- "to look into facts and circumstances of Watergate that the presidential election of 1972, I should say, and report to the Senate and recommend legislation we thought was necessary in order to improve our political campaigns. Now getting the presidential tapes really has nothing to do with that charter at all. It does have something to do with who said what, on what day the President met with John Dean or somebody else and it really doesn't have anything to do with what our charter is or interfere with our ability to make recommendations to the Senate to improve campaigns.

"MISS STAHL: Well, then you think you can fully write your final report without the tapes, is that correct?"

"SENATOR GURNEY: We can, indeed.

"MR. STRASSER: This testimony would relate to what is commonly called the cover-up. Are you saying this is not part of the Committee's jurisdiction?"

"SENATOR GURNEY: In answer to the previous question, of course that was did we need the tapes in order to write our report I said no, we didn't. The tapes would shed light on the Watergate affair, that is true, but that is really not what our charter is and that is to write our report and make recommendations to the Senate."

See Transcript at 4-6.

These are functions of the Executive and Judicial departments of the government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Here the Senate Committee has indicated that it needs the subpoenaed materials so that it can determine whether perjury has been committed. See footnote, Plaintiffs' Memorandum on Remand at 22. Determining whether a crime has been committed manifestly is outside the constitutional powers enumerated for the Congress. If the Committee has received conflicting testimony that it believes may involve perjury, the matter should be referred to the Department of Justice for appropriate legal action under the provisions of the criminal code (18 U.S.C. §§ 1621-1623). Unfortunately, the Committee insists upon performing these law enforcement and guilt adjudicating functions itself, activity that clearly exceeds its constitutional authority.

In a similar situation the Supreme Court in Kilbourn v. Thompson, 103 U.S. 168 (1880), determined that the House of Representatives had exceeded its authority in directing one of its committees to investigate the circumstances surrounding the bankruptcy of Jay Cooke and Company, in which the United States had deposited funds. The committee became particularly interested in a private real estate pool that was part of the financial structure and jailed Kilbourn for refusing to answer certain questions about the pool and to produce certain books and papers. The Court found that the subject matter of the inquiry was "in its nature clearly judicial," 103 U.S. at 192, not legislative, and the House was exceeding the limit

of its own constitutional authority.<sup>6</sup> Accordingly the committee had no lawful authority to require Kilbourn to testify as a witness or produce papers.

It is unquestionably the duty of all citizens to cooperate with Congress in its efforts to obtain the facts needed for intelligent legislative action and all citizens unremitting obligation to respond to subpoenas. However, this duty adheres only with respect to matters within the province of proper investigation. Watkins v. United States, 354 U.S. 178, 187-188 (1956). Here this Committee is acting in excess of the power conferred on Congress by the Constitution.

The fundamental holding of Kilbourn was not impaired by the subsequent cases of McGrain v. Daugherty, 273 U.S. 135 (1927), and Sinclair v. United States, 279 U.S. 263 (1929), so heavily relied upon the Committee. In both cases the Supreme Court expressly acknowledged the requirements that congressional inquiries be related to a proper legislative purpose. In McGrain, the Supreme Court found that an inquiry into the conduct of the office of Attorney General reflected legitimate legislative concerns and upheld a subpoena of the brother of the former Attorney General. Pointing out that the office of Attorney General

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6 The Court in Kilbourn v. Thompson, observed that:

It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.

102 U.S. at 190-191.

was "subject to regulation by Congressional legislation," and that the "only legitimate object the Senate could have in ordering the investigation was to aid it in legislating," the Court concluded that, in view of the subject matter, it would presume that legislation was the real object of the investigation. 273 U.S. at 178. Similarly, in Sinclair, the Court found that an inquiry into oil leases was properly related to congressional authority over public lands and rejected, on the basis of the record, the factual argument that the investigation was not in aid of legislation.

The Supreme Court has quite understandably and wisely sought to avoid the constitutional trauma inherent in a holding that Congress had exceeded its authority. But Kilbourn, and the concept that a legislative purpose is an indispensable prerequisite for a valid inquiry, are the framework in which the Court has found other grounds for declining to enforce congressional subpoenas. Subsequent cases have indicated that the "presumption" indulged by the Court in McGrain may be overcome if the connection with a proper legislative purpose becomes too tenuous. And the Supreme Court has shown particular concern where congressional inquiries have threatened to encroach upon other important constitutional rights. See Watkins v. United States, supra; United States v. Rumely, 345 U.S. 41 (1953).



In United States v. Rumely, 345 U.S. 41 (1953), where it was argued that the inquiry trespassed upon the First Amendment, the Court said:

Whenever constitutional limits upon the investigative power of Congress have to be drawn by this Court, it ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits.

345 U.S. at 46. The Court went on to hold that questions put to the defendant exceeded the bounds of the resolution by the House of Representatives creating the committee -- notwithstanding the subsequent ratification of the committee's action by the House.

In Watkins v. United States, 354 U.S. 178 (1957), the Supreme Court affirmed that:

No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to "punish" those investigated are indefensible.

354 U.S. at 187. The Court cited Kilbourn for the proposition that an investigation unrelated to legislative purpose would be "beyond the powers conferred upon the Congress in the Constitution" and Rumely for the proposition that "the mere semblance of legislative purpose would not justify an inquiry in the face of the Bill of Rights." 354 U.S. at 198. The Court held that the House Resolution in question was so broad that the defendant could not fairly determine whether the questions put to him were pertinent to the committee's inquiry.

In this case, as in Rumely and Watkins, there is a collision between the congressional pursuit of information and an important Constitutional right. In Rumely and Watkins the Supreme Court was concerned with the impact of congressional investigations upon First Amendment freedoms. Here the investigation directly

challenges the Presidency. The importance of confidentiality to the Office of the President, and the implications of seeking to impose judicial control upon the conduct of that office, are treated elsewhere in this memorandum. Certainly the preservation of the ability of Presidents to function is no less crucial to our Constitutional system than the vindication of First Amendment rights.

Watkins is important too for the flat and famous statement in which the Court said: "We have no doubt that there is no congressional power to expose for the sake of exposure." 345 U.S. at 200.<sup>7</sup> Of course the Senate is authorized to investigate campaign practices to see if legislation is needed in that area. But every time a member of the Committee speaks of the importance of "who said what to whom" or "what the President knew and when," and everytime the plaintiffs' briefwriters harp, as they do so repeatedly, on "the President's own possible criminality," Supplementary Memorandum in Support of Plaintiffs' Motion for Summary Judgement at 2, they make it manifest that what they are interested in here is "to expose for the sake of exposure."

The plaintiffs can take no comfort in the ruling in Nixon v. Sirica, because a careful reading of that decision reveals that the court emphasized the "narrow contours of the problem" and the fact that the decision was limited

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7 In Watkins the Court also pointed with envy to England, where investigations of this kind are entrusted to royal commissions, removed from the turbulent forces of politics and partisan considerations. "Seldom, if ever, have these commissions been given the authority to compel the testimony of witnesses or the production of documents." Nevertheless, they have, as the Court noted, enjoyed "success in fulfilling their fact-finding missions without resort to coercive tactics \* \* \*." 354 U.S. at 191-192.

to the "entirely unique circumstances of the case." Nixon v. Sirica supra at 4. Indeed, the exception to the principle of executive privilege carved out there depends entirely upon "the grand jury showing that the evidence is directly relevant to its decisions." Nixon v. Sirica, supra at 34. Obviously, if a grand jury is considering indicting for perjury when contradictory statements were made by different persons, it must ascertain who was not truthful in order to indict the proper person. It could be argued that the grand jury may have been completely precluded from returning any perjury indictments if it did not have access to the tapes.

The Senate Committee does not find itself in an analogous situation. Its primary function -- the proposing of legislation -- is not completely precluded because there is some conflict in the testimony given before the Committee. However, it is argued that the subpoenas in question (and supposedly the most recent subpoenas that demand access to hundreds of tapes, documents, notes, memoranda, etc.) must be complied with in order that the Congress' "informing function" can be accomplished.

It is submitted that the Committee has not been unduly frustrated in carrying out its informing function. The President has permitted many of his closest aides and advisors to give public testimony without claiming privilege. The Committee has had voluminous documents submitted as evidence. There are about 10,000 pages of testimony that have been given under oath. The Special Prosecutor has taken guilty pleas in a number of instances

and advises that further indictments will be forthcoming. The story of Watergate is unfolding, but it should do so in an orderly manner. As the President stated in his letter of January 4, 1974, to the Chairman of the Senate Select Committee:

As you are aware, substantial numbers of materials have been provided to the Office of the Special Prosecutor for possible use with grand juries. With respect to whatever portions of the materials covered by your subpoena may be relevant to matters now subject to grand jury investigation, and potentially, criminal trials, disclosures to you, and through you to the public, could seriously impair the ability of the Office of the Special Prosecutor to complete its investigations and successfully prosecute the criminal cases which may arise from the grand juries.

There are strong reasons why the most private conversations and documents of the President should not be disclosed. If any of these items should be released to any extent, at least it should be under the auspices of the grand jury and its traditional cloak of secrecy. The public disclosure of conversations and memoranda that were always intended to be private has a tendency to degrade and ridicule the Presidency by transforming heretofore private and personal discussions into cocktail party entertainment. ✓

IV. The President Has the Power to Withhold Information from Congress the Disclosure of Which He Determines to Be Contrary to the Public Interest

Plaintiffs' reliance on the Court of Appeals decision in Nixon v. Sirica to support its contention that Congress may force disclosure of the President's confidential conversations and documents is not only misplaced, but is significantly demonstrative of the extraordinary request it makes of the Court. Plaintiffs admit that Nixon v. Sirica was decided in the context of a grand jury subpoena. They recognize that the President has already disclosed to the

grand jury the evidence at issue here. Nevertheless these plaintiffs accuse Richard M. Nixon of suppressing evidence and ask this Court to rule that a congressional committee may completely disregard a claim of executive privilege by purporting to investigate "executive wrongdoing." Such an accusation is irresponsible. Such a claim of power is historically and constitutionally unsupportable. As the Court of Appeals clearly stated in its opinion in Nixon v. Sirica, "We recognize this great public interest, and agree with the District Court that such conversations are presumptively privileged." Id. at 30.

The President has refused disclosure to this Committee because he has determined that such disclosure would be contrary to the public interest. The President, even more so than the members of this Congressional Committee, is the elected representative of all people. Therefore, the President owes a duty to the people to maintain the constitutional integrity of the office he occupies.

Whenever any branch of the Government exceeds the limits of the grant made to it by the Constitution, it, to that extent, ceases to represent the people and assumes arbitrary power. Defense by the Executive of his Constitutional powers becomes, in very truth, therefore, defense of popular rights -- defense of power which the people granted to him. It was in that sense that President Cleveland spoke of his duty to the people not to relinquish any of the powers of his great office. It was in that sense that President Buchanan stated the people have 'rights and prerogatives' in the execution of his office by the President which every President is under a duty to see 'shall never be violated in his person' but 'pass to his successors unimpaired by the adoption of a dangerous precedent.' In maintaining his rights against a trespassing Congress, the President defends not himself but popular Government; he represents not himself but the People.

Warren, Presidential Declarations of Independence, 10 Bos.

U. L. Rev. 1, 35 (1930).

Maintenance of executive confidentiality as provided by the constitutional separation of powers has been recognized by this Court in its opinion in Misc. No. 47-73, Opinion at 5, 7-8; and by the Court of Appeals in Nixon v. Sirica, supra at 30.

We reassert the importance of that principle here,<sup>8</sup> but before dealing with it in detail it is necessary to discuss the basis for plaintiffs' claim of the right to information and the basis for the President's refusal to furnish it.

A. Basis for Executive Privilege.

Plaintiffs refer in a previously submitted "Historical Appendix" to a series of instances where Presidents and their aides have cooperated with Congressional requests for information. Their analysis includes instances where either testimony or documents were furnished to Congress by the Executive on a voluntary basis. Although plaintiffs' uses

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8 As his Ninth Defense to plaintiffs' original complaint, the President asserted that the subpoena attached as Exhibit D to plaintiffs' Complaint was so unreasonably broad and oppressive as to make compliance impossible. This should be obvious from the face of the subpoena itself. It specifies no time period and demands a wide variety of records relating to 25 persons on a number of different subjects. Compliance would require a complete review of virtually all records in the White House. Needless to say, there await for future litigation three additional subpoenas of such extraordinary breadth that it is inaccurate to characterize them merely as overbroad and oppressive. If it would be helpful to the Court in considering what we believe is the apparent overbreadth of the pending demands, both in the instant case and future cases, appropriate affidavits will be filed to sustain the President's position on this issue.

of history must be relied on with the utmost caution,<sup>9</sup> it is of course true that this President, like all of his predecessors, has often made voluntary disclosures of information sought by Congress. Plaintiffs have not cited any authority, either historical or legal, for the proposition that a President can be compelled to furnish information to the Congress. There is good reason for this. There is no such authority.

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9 In their original papers, including the "Historical Appendix," plaintiffs' sole reliance for history is on an article by Raoul Berger, which they cite 15 times. Professor Berger is a reputable scholar and a provocative analyst but he is not always accurate in his statement of history. Thus at page 5 of the "Historical Appendix" plaintiffs cite the Berger article for the proposition that President Jefferson "fully complied" with the subpoena issued against him in the Burr litigation. This is simply not true. The facts are fully developed by Judge Wilkey at pages 41-55 of his dissent in Nixon v. Sirica. They show that ultimately Jefferson sent a copy of the letter with a certificate reciting that he had omitted "some passages entirely confidential, given for my information in the discharge of my executive functions, and which my duties and the public interest forbid me to make public." 9 Ford, Writings of Thomas Jefferson 64 (1898). See also 3 Beveridge, Life of John Marshall 518-522 (1919).

Again in a footnote at page 24 of their original brief, plaintiffs cite the Berger article for the following proposition: "President Jackson, for example, refused to produce documents relating to wrongdoing by a former executive official, but only on the ground that the congressional investigation was being conducted in camera, thus depriving the individual in question of an opportunity for public vindication." President Jackson's message of February 10, 1835, referred to by plaintiffs, appears at 3 Richardson, Messages and Papers of the Presidents, 1789-1897 132 (1897). The latter occupies three printed pages. The bulk of it discusses the fact that the demand encroaches on the constitutional powers of the Executive and that if Congress does not like what the President is doing it should impeach him. After a lengthy discussion of this point there are two sentences in which Jackson refers to the fact that the papers would be considered in executive session. Following that he states again his original objection to the demand. Thus the statement by plaintiffs that he refused compliance only on the ground that the hearing was being conducted in camera is a gross distortion of the historical fact.

There are, however, many instances where Presidents have refused to furnish information to Congress and, in each case, the refusal has been accepted.

The frequently exercised, long-standing freedom of the Executive to refuse demands by Congress for the production of documents does not require extended discussion.<sup>10</sup> Under the Continental Congress, the relationship between Legislature and Executive had been modeled on the British system. The executive departments were, in effect, answerable to the Legislature, and could be called on for an accounting. A resolution of the Continental Congress creating the Department of Foreign Affairs, whose head was appointed by and held office at the pleasure of Congress, provided:

That the books, records and other papers of the United States, that relate to this department be committed to his custody, to which, and all other papers of his office, any member of Congress shall have access: provided that no copy shall be taken of matters of a secret nature without the special leave of Congress.

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10 It seems ironic indeed that the plaintiffs suggest on one hand that their investigation has been "emasculated" by Presidential refusals to disclose information and on the other hand urge that the extent of Presidential disclosure constitutes a waiver. Both arguments are equally unsupported. The President voluntarily has allowed unprecedented access to the testimony and memoranda of top assistants. However such cooperation hardly amounts to a waiver of all executive privilege. United States v. Reynolds, 345 U. S. 1, 11 (1953) holds specifically to the contrary. As Alexander Bickel has decisively observed, "Far from being waived, the privilege, it seems to me, is as much exercised when information is released as when it is withheld." Bickel, Wretched Tapes (cont.), N. Y. Times, August 15, p. 33.



This was completely changed by the Constitution in establishing the three independent branches. See Wolkinson, Demands of Congressional Committees for Executive Papers, 10 Fed. Bar J. 319, 328-330 (1949).

Since then there has arisen an often asserted, much discussed, and well recognized privilege of the President to deny Congress access to documents whenever either the President or the head of a department has deemed it in the public interest to do so. From the administration of Washington to the present, Presidents have repeatedly asserted the privilege, and, when forced to a showdown, Congress has always yielded and ceased to press its demands.<sup>11</sup> A recent instance was the refusal of President Truman to turn over to the House Committee on Un-American Activities files relating to the federal employee loyalty program. Directive of March 13, 1948, 13 Fed. Reg. 1359 (1948).

- 11 The following is a partial list of examples of successful assertions of the privilege, comprising partly assertions by the President and partly assertions by department heads:

President	Date	Type of Information Refused
Washington	1796	Instructions to U. S. Minister concerning Jay Treaty.
Jefferson	1807	Confidential information and letters relating to Burr's conspiracy.
Monroe	1825	Documents relating to conduct of naval officers.
Jackson	1833	Copy of paper read by President to heads of Departments relating to removal of bank deposits.
	1835	Copies of charges against removed public official.
		List of all appointments made without Senate's consent between 1829 and 1836, and those receiving salaries without holding office.

President Truman was persistent in his refusals to the House Committee on Un-American Activities. In 1953,

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President	Date	Type of Information Refused
Tyler	1842	Names of members of 26th and 27th Congress who have applied for office.
	1843	Colonel Hitchcock's report to the War Department dealing with alleged frauds practiced on Indians, and his views of personal characters of Indian delegates.
Polk	1846	Evidence of payments made through State Department on President's certificates, by prior administration.
Fillmore	1852	Official information concerning proposition made by King of Sandwich Islands to transfer to U.S.
Buchanan	1860	Message to Protest to House against Resolution to investigate attempts by Executive to influence legislation.
Lincoln	1861	Dispatches of Major Anderson to the War Department concerning defense of Fort Sumter.
Grant	1876	Information concerning executive acts performed away from Capitol.
Hayes	1877	Secretary of Treasury refused to answer questions and to produce papers concerning reasons for nomination of Theodore Roosevelt as Collector of Port of New York.
Cleveland	1886	Documents relating to suspension and removal of 650 Federal officials.
Theodore Roosevelt	1909	Attorney General's reasons for failure to prosecute U. S. Steel Corporation. Documents of Bureau of Corporations, Department of Commerce.
Coolidge	1924	List of companies in which Secretary of Treasury Mellon was interested.

after he left the White House, he refused to honor a subpoena of the Committee that he appear and give testimony on charges that he and then Attorney General Tom C.

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President	Date	Type of Information Refused
Hoover	1930	Telegrams and letters leading up to London Naval Treaty.
	1932	Testimony and documents concerning investigation made in Treasury Department.
Franklin D. Roosevelt	1941	Federal Bureau of Investigation reports.
	1943	Director, Bureau of Budget, refused to testify and to produce files.
	1943	Chairman, Federal Communications Comm., and Board of War Communications refused records.
	1943	General Counsel, Federal Communications Commission, refused to produce records.
	1943	Secretaries of War and Navy refused to furnish documents, and permission for Army and Naval officers to testify.
Truman	1944	J. Edgar Hoover refused to give testimony and to produce President's directive.
	1945	Issued directions to heads of executive departments to permit officers and employees to give information to Pearl Harbor Committee, but the President's directive did not include any files or written material.
	1947	Civil Service Commission records concerning applicants for positions.

See Wolkinson, Demands of Congressional Committees for Executive Papers, 10 Fed. Bar J. 103, 147 (1949).

More recent examples are described in Kramer & Marcuse, Executive Privilege -- A Study of the Period 1953-1960, 29 Geo. Wash. L. Rev. 623 (part 1) and 827 (part 2) (1961). See also Younger, Congressional Investigations: A Study in the Separation of Powers, 20 Univ. Pitt. L. Rev. 755 (1959).

Clark knowingly promoted an enemy agent. President Truman stated:

I am carrying out the provisions of the Constitution of the United States; and am following a long line of precedents, commencing with George Washington himself in 1796. Since his day, Presidents Jefferson, Monroe, Jackson, Tyler, Polk, Fillmore, Buchanan, Lincoln, Grant, Hayes, Cleveland, Theodore Roosevelt, Coolidge, Hoover, and Franklin D. Roosevelt have declined to respond to subpoenas or demands for information of various kinds from Congress.

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The doctrine would be shattered, and the President, contrary to our fundamental theory of constitutional government, would become a mere arm of the Legislative Branch of the government if he would feel during his term of office that his every act might be subject to official inquiry and possible distortion for political purposes.

N. Y. Times, November 13, 1953, p. 13. Following receipt of the strongly worded letter from President Truman, the committee declined to press the matter further.

Reference to this unbroken record of successful assertions of privilege in practice is particularly significant in illustrating the constitutionally implied separation of powers. In the construction of any clause of the Constitution uninterrupted usage continuing from the early days of the Constitution would be of great weight.

Both officers, lawmakers and citizens naturally adjust themselves to any long-continued action of the Executive Department -- on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself -- even when the validity of the practice is the subject of investigation.

United States v. Midwest Oil Co., 236 U. S. 459, 472-473 (1915);

United States v. MacDaniel, 7 Pet. (7 U.S.) 1, 13-14 (1833).

Here, moreover, because the doctrine of separation of powers is not contained in express language in the Constitution, Ex parte Grossman, 267 U.S. 87, 119 (1925), and because the functioning of our Government depends so largely upon limits on the powers of each branch derived from practical adjustments based on a fair regard by each for the necessities of the others, we think that the historic usage is especially meaningful. "Even constitutional power, when the text is

doubtful, may be established by usage." Inland Waterways Corp. v. Young, 309 U.S. 517, 525 (1940). In the Pocket Veto Case, 279 U.S. 655 (1929), the Court reviewed the legality of a Presidential pocket veto of a bill that would have allowed certain Indian tribes to sue in the Court of Claims. In upholding the President's exercise of that power the Court stated:

The views which we have expressed as to the construction and effect of the constitutional provision here in question are confirmed by the practical construction that has been given to it by the Presidents through a long course of years, in which Congress has acquiesced. Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character.

279 U.S. at 688-689.

These successful executive assertions of privilege against Congress have frequently been acknowledged by Congress itself. A typical example of this Congressional acknowledgment occurred during the Senate hearings on President Truman's dismissal of General MacArthur. Military Situation in the Far East, Hearings before the Committee on Armed Services and the Committee on Foreign Relations, U.S. Senate, 82nd Cong., 1st Sess. (1951), at 763, 765. General Omar Bradley was questioned about a meeting with the President, George Marshall, and Dean Acheson. Gen. Bradley replied, "Senator, at that time I was in a position of a confidential advisor to the President. I do not feel at liberty to publicize what any of us said at that time." Chairman Richard Russell was quick to recognize the necessity for such confidentiality and upheld the claim of privilege stating:

I know that in my opinion any conversation with respect to any of my actions that I might have, any conference I might have with my administrative assistant in my office I think should be protected, and it is my own view, and I so rule, that any matter that transpired in the private conversation between the President and the Chief of Staff as to detail can be protected by the witness if he so desires, and if General Bradley

relies upon that relationship, so far as the Chair is concerned, though I regret very much that the issue was raised and I am compelled to pass on it, I would rule that he be protected.

Hearings at 765. The Chairman's decision upholding the claim of privilege subsequently was ratified after extensive debate for several days by a Committee vote of 18-8. Hearings at 872. See also, e.g. H.Rep. No. 1595, 80th Cong., 2nd Sess., (1948) at 2-3, 7. Even in the heat of contest members of Congress have recognized the wisdom of acceding to the constitutional principles here asserted by the President.

During the administration of President Hayes, for example, the House Judiciary Committee, under the chairmanship of Benjamin F. Butler, pointed out that all resolutions directed to the President relating to the production of records properly would contain the clause "if in his judgment not inconsistent with the public interest." H.Rep. No. 141, 45th Cong., 3rd Sess., (1879), at 3. And the Committee continued, Id. at 3 and 4:

\* \* \* whenever the President has returned (as sometimes he has) that, in his judgment, it was not consistent with the public interest to give the House such information, no further proceedings have ever been taken to compel the production of such information. Indeed, upon principle, it would seem that this must be so. The Executive is as independent of either house of Congress as either house of Congress is independent of him, and they cannot call for the records of his action or the action of his officers against his consent, any more than he can call for any of the journals and records of the House or Senate.

The decision as to whether there should be compliance with a particular request was the Executive's, the committee stated:

Somebody must judge upon this point. It clearly cannot be the House or its committee, because they cannot know the importance of having the doings of the executive department kept secret. The head of the executive department, therefore,

During the hearings on the nomination of the Honorable Abe Fortas to be Chief Justice of the United States, Senator Ervin began to question the nominee about his participation in discussions with President Johnson that led to an order sending federal troops into Detroit. Senator Ervin then said, however: "I will not insist upon your answer, because it is a prerogative of communications in the executive branch of the Government." Hearings before the Committee on the Judiciary, U.S. Senate, Nominations of Abe Fortas and Homer Thornberry, 90th Cong., 2d Sess. (1968), at 124. The question was not answered. At a later point, in response to a different question from Senator Ervin, Justice Fortas answered:

Senator, I will not go into any conversations, either to affirm them or to deny them, that I have had with the President. I ask you please to understand that, and please to excuse me. I know how easy it is to say no, the President did not say something to me. But the question is "What did he say?" would follow, and so on. I must ask you to indulge me to this extent. I have endeavored Senator, and Mr. Chairman, to err, if I erred, on the side of frankness and candor with this committee. But I think that it is my duty to observe certain limits, and one of those limits is any conversation, either affirmation or denial, that I may have had with the President of the United States.

Id. at 167-168. Later in the hearings, Senator McClellan said to the nominee:

I am not quarrelling with your position that you cannot say and do not want to say what conversations you may have had with the President. I respect that position if you wish to take it.

Id. at 225. At no point in the hearings did any Senator disagree with these views of Senator Ervin, Justice Fortas, and Senator McClellan.

During the hearings before the Senate Judiciary Committee relating to the nomination of Mr. Richard G. Kleindienst as Attorney General, Mr. Peter Flanigan, Special Assistant to the President, was invited to appear and testify about ITT matters. The Counsel to the President responded by pointing out that under the doctrine of separation of powers and long

must be the judge in such case and decide it upon his own responsibility to the people, and to the House, upon a case of impeachment brought against him for so doing, if his acts are causeless, malicious, willfully wrong, or to the detriment of the public interests.

There are many other instances of Congressional recognition of the executive privilege, vis-a-vis Congress, including one which gave rise to a great congressional debate, occupying the Senate for almost two weeks, during President Cleveland's first administration. 17 Cong. Rec. 2211-2814 (1886). See Sen. Misc. Doc., Vol. 7, 52d Cong., 2d Sess. (1886), at 235-243; 8 Richardson, Messages and Papers of the Presidents 375-383 (1886); 17 Cong. Rec. 4095 (1886). In the course of this debate many past examples of executive refusals to produce papers demanded by Congress were discussed. See, e.g., 17 Cong. Rec. 2622-2623 (1886).<sup>12</sup>

A more recent instance was the congressional reaction to President Kennedy's refusal to disclose the names of Defense Department speech reviewers. Committee on Armed Services, U.S. Senate, Military Cold War Escalation and Speech Review Policies, 87th Cong., 2d Sess. (1962), at 338, 369-370, 508-509, 725, 730-731. The Senate Subcommittee, speaking through Senator Stennis, conceded:

We now come face to face and are in direct conflict with the established doctrine of separation of powers \* \* \*.

I know of no case where the Court has ever made the Senate or the House surrender records from its files, or where the Executive has made the Legislative Branch surrender records from its files -- and I do not think either one of them could. So the rule works three ways. Each is supreme within its field, and each is responsible within its field.

Id. at 512.

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12 This debate ended with the approval by the Senate, in a vote on party lines, of resolutions condemning the President and the Attorney General. No result came from the resolutions. See 17 Cong. Rec. 2813-2814 (1886).



established historical precedents, members of the President's immediate staff do not appear and testify before congressional committees with respect to the performance of their duties. Thereafter, the Senate Judiciary Committee adopted a resolution on April 18, 1972, in which it was agreed that Mr. Flanigan "is not required to testify to any knowledge based on confidential communications between him and the President or between him and other aides of the President." Thereafter, a Presidential Assistant appeared and testified to the matters agreed to. Hearings before the Committee on the Judiciary, U.S. Senate, Nomination of Richard G. Kleindienst, of Arizona, to be Attorney General. 92nd Cong., 2d Sess. (1972), at 1630-1631.

B. The Need for Confidentiality.

There has long been general recognition that high officers in every branch of government cannot function effectively unless they are able to preserve the confidentiality of their communications with their intimate advisers. This recognition extends even to plaintiffs in this case. Professor Dash has stated that "We are not, as I have indicated, asking for any ruling by this Court that the President doesn't have Executive Privilege. He certainly does." Transcript at 25. Professor Dash also advised this Court that:

Senator Ervin, Chairman of the Committee, has frequently stated that he concurs and agrees there must be an Executive Privilege where the President must be in a position to be able to withhold certain materials in order to preserve confidentiality. (emphasis supplied)

Transcript at 11. Such a recognition by plaintiffs is no more than awareness of both the practical necessity and judicial approbation of executive confidentiality.

In Environmental Protection Agency v. Mink, 410 U.S. 73, 87 (1973), the Court quoted with approval the statement of Justice Reed, sitting by designation in the Court of Claims,

in Kaiser Aluminum & Chemical Corp. v. United States,  
157 F.Supp. 939, 946 (Ct.Cl. 1958):

There is a public policy involved in this claim of privilege for this advisory opinion -- the policy of open, frank discussion between subordinate and chief concerning administrative action.

Discussions of this kind are regarded as privileged "for the benefit of the public, not of executives who may happen to then hold office," Id. at 944, since it is the public that is served when those who represent it are able to make important decisions with the wisdom that only open and frank discussion can provide. Judge Robinson has spelled out this point more fully:

This privilege, as do all evidentiary privileges, affects an adjustment between important but competing interests. There is, on the one hand, the public concern in revelations facilitating the just resolution of legal disputes, and, on the other, occasional but compelling public needs for confidentiality. In striking the balance in favor of nondisclosure of intra-governmental advisory and deliberative communications, the privilege subserves a preponderating policy of frank expression and discussion among those upon whom rests the responsibility for making the determinations that enable government to operate, and thus achieves an objective akin to those attained by other privileges more ancient and commonplace in character. Nowhere is the public interest more vitally involved than in the fidelity of the sovereign's decision and policymaking resources.

Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena, 40 F.R.D. 318, 324-325 (D.D.C. 1966), affirmed on the opinion below 384 F.2d 979, cert. denied 389 U.S. 952 (1967). See also 5 U.S.C. § 552(b)(5); Rogers, The Right to Know Government Business From the Viewpoint of the Government Official, 40 Marq.L.Rev. 83, 89 (1956).

This case concerns the ability of the President to enjoy confidentiality in carrying out his official duties. But this important privilege is not one that is available only to assist the functioning of the President, or the Executive Branch generally. As Judge Wilkey recently wrote, "the privilege against disclosure of the decision-making process is a tripartite privilege, because precisely the same privilege in conducting certain aspects of public business exists for the

legislative and judicial branches as well as for the executive." Soucie v. David, 448 F.2d 1067, 1080 (1971) (concurring opinion).

Although Professor Arthur Selwyn Miller and a collaborator have recently argued to the contrary, Miller & Sastri, Secrecy and the Supreme Court: On The Need for Piercing the Red Velour Curtain, 22 Buff. L. Rev. 799 (1973), it has always been recognized that judges must be able to confer with their colleagues, and with their law clerks, in circumstances of absolute confidentiality. Justice Brennan has written that Supreme Court conferences are held in "absolute secrecy" for "obvious reasons." Brennan, Working at Justice, in An Autobiography of the Supreme Court 300 (Westin ed. 1963). Justice Frankfurter had said that the "secrecy that envelops the Court's work" is "essential to the effective functioning of the Court." Frankfurter, Mr. Justice Roberts, 104 U.Pa.L.Rev. 311, 313 (1955). And only two years ago Chief Justice Burger analogized the confidentiality of the Court to that of the Executive, and said:

No statute gives this Court express power to establish and enforce the utmost security measures for the secrecy of our deliberations and records. Yet I have little doubt as to the inherent power of the Court to protect the confidentiality of its internal operations by whatever judicial measures may be required.

New York Times Co. v. United States, 403 U.S. 713, 752 n. 3 (1971) (Burger, C.J. dissenting). In the recent contempt proceeding arising out of the trial of the Chicago Seven, Judge Gignoux refused to allow the defense even to call as a witness a person who had been law clerk to Judge Hoffman at the time of the original trial, on the ground that everything that a law clerk knows about his judge is privileged. ✓

The Judiciary works in conditions of confidentiality and it claims a privilege against giving testimony about the official conduct of judges. Statement of the Judges,

14 F.R.D. 335 (N.D.Cal. 1953). See also the letter of Justice Tom C. Clark, refusing to respond to a subpoena to appear before the House Un-American Activities Committee, on the ground that the "complete independence of the judiciary is necessary to the proper administration of justice." N. Y. Times, Nov. 14, 1953, p. 9.

A similar need for confidentiality, and an insistence that it cannot be breached by other branches of government, applies in the Legislative Branch. Neither a member of Congress nor his legislative aides can be compelled to disclose communications between the member and his aides relating to any legislative act of the member. Gravel v. United States, 408 U.S. 606, 629 (1972). It is immaterial that these communications might show criminal acts. 408 U.S. at 615. These aspects of the Gravel decision reflect in large part acceptance by the Court of the arguments presented by Senator Ervin and seven other Senators on behalf of the Senate as amicus curiae in that case. As reprinted in the Congressional Record, the amicus brief argued in part:

To isolate a Senator so that he cannot call upon the advice, counsel and knowledge of his personal assistants is to stop him from functioning as an independent legislator. If an aide must fear that the advice he offers, the knowledge he has, and the assistance he gives to his Senator may be called into question by the Executive, then he is likely to refrain from acting on those very occasions when the issues are the most controversial and when the Senator is most in need of assistance.

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The Congressional privilege based upon an express Constitutional provision to encourage the free exchange of ideas and information can hardly be less extensive than the Executive privilege which has not express statutory or Constitutional basis and whose sole purpose is secrecy. Yet the Executive privilege has been extended to the activities of persons whose relationship to the President is far more remote than the relationship of an aide to a Senator.

The need for protecting the confidential relationships between the President and his aides, as the Government has asserted in defending the Executive privilege, is pari passu applicable to the need for protecting the relationship between Senators and their aides.

Cong. Rec. S5856, S5857 (daily ed. April 11, 1972).

Again it is the long established practice of each House of Congress to regard its own private papers as privileged. No court subpoena is complied with by the Congress or its committees without a vote of the House concerned to turn over the documents. Soucie v. David, 448 F.2d 1067, 1081-1082 (1971). This practice is insisted on in Congress even when the result may be to deny relevant evidence in a criminal proceeding either to the prosecution or to the accused person.<sup>13</sup>

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- 13 See, e.g., 108 Cong. Rec. 3626 (1962), showing Senate adoption of a resolution permitting staff members and former staff members of a Senate Committee to appear and to testify in a criminal proceeding against James Hoffa but forbidding them from taking any documents or records in the custody of the Senate and from testifying about information that they gained while employed in the Senate. In explaining the resolution to the Senate, Senator McClellan said in part: "The Senate recognizes it has certain privileges as a separate and distinct branch of Government, which it wishes to protect." Id. at 3627.

On July 16, 1970, counsel for 1st Lt. William L. Calley, Jr., moved in his court-martial proceeding for production of testimony concerning the My Lai incident that had been presented to a subcommittee of the House Committee on Armed Services in executive session. Lt. Calley claimed that this testimony would be exculpatory of him and would help him establish his defense in the court-martial. The subcommittee Chairman, Rep. F. Edward Hebert, refused to make the testimony available, advising defense counsel on July 17, 1970, that Congress is "an independent branch of the Government, separate from but equal to the Executive and Judicial branches," and that accordingly only Congress can direct the disclosure of legislative records. He concluded from this that the material requested by the defense was not within the rule of Brady v. Maryland, 373 U.S. 83 (1963), nor subject to the requirements of the Jencks Act, 18 U.S.C. § 3500. Subsequently the military court issued a subpoena to the Clerk of the House of Representatives. The Speaker laid this before the House on November 17, 1970, 116 Cong. Rec. 37652 (1970), but to date the House has taken no action nor given any indication that it will supply the information sought.

Plaintiffs nonetheless argue that neither Congressmen nor grand or petit jurors enjoy privilege to "suppress evidence relating to official misconduct." Memorandum on Remand at 26-27. This argument and its reliance on United States v. Gravel, supra, United States v. Brewster, 408 U.S. 501, 521 (1972), and Clark v. United States, 289 U.S. 1 (1933), simply is not applicable to this case. None of the cases cited by plaintiffs, including Gravel, Brewster, and Clark, involve congressional requests for evidence. They all were cases in which a grand jury investigation of alleged misconduct overcame historically recognized claims of confidentiality. Those decisions were based, as was the decision in Nixon v. Sirica, on the traditional role of the grand jury in investigating criminal activity. Here all evidence being sought by this committee has been delivered voluntarily to the grand jury by the President. There is no "suppression of evidence" by the President. There is no frustration of any law enforcement activity or judicial proceeding. There is, however, a determination by the President that these plaintiffs not be allowed to undercut the independence and integrity of the executive branch.

These plaintiffs cannot claim to require these confidential materials in order to indict or accuse guilty persons. That is the role of a grand jury, and properly so, since it is incomprehensible that formal claims of executive privilege would be overruled each time a congressional committee decided to investigate imagined "executive wrongdoing".

These considerations of public policy are particularly compelling when applied to Presidential communications with his advisers.

Inseparable from the modern Presidency, indeed essential to its effective operation, is a whole train of officers and offices that serve him as eyes, ears, arms, mouth, and brain.

Rossiter, The American Presidency 97 (1956). Nor is it only those who are part of his staff with whom the President must be able to talk. He must be able to confer with foreign leaders and with representatives of every element in American public. He must be free to look for advice to anyone whose advice he trusts, whether in or out of government. The late Dean Acheson and former Justice Abe Fortas are merely recent and conspicuous examples of persons who were consulted by Presidents on critical public issues at times that they held no public office. "The President is, as he should be, entirely free, \* \* \* like all who preceded him, to take counsel with private citizens." Id. at 103.

For the Presidency to work effectively and for the President to get candid advice from those to whom he turns it is absolutely essential that he be able to protect the confidentiality of these communications. As stated by the President on July 6, 1973, in his letter to Senator Sam J. Ervin:

No President could function if the private papers of his office, prepared by his personal staff, were open to public scrutiny. Formulation of sound public policy requires that the President and his personal staff be able to communicate among themselves in complete candor, and that their tentative judgments, their exploration of alternatives, and their frank comments on issues and personalities at home and abroad remain confidential.

This has been the position of every President in our history, and it has been specifically stated by President Nixon's immediate predecessors. Writing his memoirs in 1955, President Truman explained that he had found it necessary to omit certain material, and said: "Some of this material cannot be made available for

many years, perhaps for many generations." 1 Truman, Memoirs x (1955).<sup>14</sup> President Eisenhower stated the point with force on July 6, 1955, in connection with the Dixon-Yates controversy:

But when it comes to the conversations that take place between any responsible official and his advisers or exchange of little, mere little slips of this or that, expressing personal opinions on the most confidential basis, those are not subject to investigation by anybody, and if they are, will wreck the Government.

There is no business that could be run if there would be exposed every single thought that an adviser might have, because in the process of reaching an agreed position, there are many, many conflicting opinions to be brought together. And if any commander is going to get the free, unprejudiced opinions of his subordinates, he had better protect what they have to say to him on a confidential basis.

Public Papers of Presidents of the United States: Dwight D. Eisenhower 1955 674 (1959).

Congress itself recognized the high degree of confidentiality that must attach to Presidential papers for many years when it enacted the Presidential Libraries Act of 1955, Pub. L. 84-373, 69 Stat. 695 (1955), now codified in 44 U.S.C. §§ 2107, 2108. That statute encourages Presidents to give their papers to a Presidential library, and provides that papers, documents, and other historical materials so given "are subject to

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<sup>14</sup> President Truman's strong feelings concerning the necessity for confidentiality were discussed by his daughter in a recent biography:

Lately some historians have criticized Dad because he has refused to open his confidential files. But Dad is not acting out of selfish motives. From the day he left office he was conscious that he still had heavy responsibilities as an ex-president. During his White House years a president gets advice from hundreds of people. He wants it to be good advice. He wants men to say exactly what they think, to tell exactly what they know about a situation or a subject. A President can only get this kind of honesty if the man who is giving the advice knows what he says is absolutely confidential, and will not be published for a reasonable number of years after the president leaves the White House.

Truman, Harry S. Truman 562 (1973).



restrictions as to their availability and use stated in writing by the donors or depositors\* \* \*. The restrictions shall be respected for the period stated, or until revoked or terminated by the donors or depositors or by persons legally qualified to act on their behalf." 44 U.S.C. § 2108 (c); Nichols v. United States, 460 F.2d 671 (10th Cir. 1972). Since that Act was passed the gifts of Presidential papers of Presidents Eisenhower, Kennedy, and Johnson have all specified that "materials containing statements made by or to" the President are to be kept "in confidence" and are to be held under seal and not revealed to anyone except the donors or archival personnel until "the passage of time or other circumstances no longer require such materials being kept under restriction." Letter of April 13, 1960, from President Dwight D. Eisenhower to the Administrator of General Services; Agreement of Feb. 25, 1965, between Mrs. Jacqueline B. Kennedy and the United States; Letter of Aug. 13, 1965, from President Lyndon B. Johnson to the Administrator of General Services. In addition, the letters from President Eisenhower and from President Johnson specifically prohibit disclosure to "public officials" and state, as the reason for these restrictions, that "the President of the United States is the recipient of many confidences from others, and \* \* \* the inviolability of such confidence is essential to the functioning of the constitutional office of the Presidency \* \* \*."

The need to preserve the confidentiality of the Oval Office has been recognized from without as well as by those who have borne the burdens of service there. What Justice Stewart, who was joined by Justice White, said in his concurring opinion in New York Times Co. v. United States, 403 U.S. 713, 727 (1971), has great force:

And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. \* \* \*

\* \* \* [I]t is clear to me that it is the constitutional duty of the Executive -- as a matter of sovereign prerogative and not as a matter of law as the courts know law -- through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.

403 U.S. at 728, 729-730.

Other justices of the Supreme Court have expressed their views on congressional assaults on Presidential confidentiality. Justice Douglas has written: "In defending himself against investigation by Congress every President has acted rightfully. In refusing to be investigated by Congress he defends popular sovereignty and the separation of powers." Douglas, Anatomy of Liberty 72 (1963). Justice Douglas also is cognizant of the long tradition of Presidential refusals to yield to congressional demands for information:

Each President -- from Washington to Kennedy -- has deemed it to be in his prerogative not to disclose certain information to the legislative branch. Taft defended that principle, saying a President can keep information confidential 'if he does not deem the disclosure of such information prudent or in the public interest.' Certainly much information must be kept secret; at least, the President might so believe. Defense items, the operations of diplomatic missions, the communications with our embassies or legations -- these are sensitive matters. Moreover, employees of the executive branch are in a chain of command leading up to the President. If any of them can be summoned and interrogated as to how he advised his superior, what memoranda he wrote, what conversation he has had, a disruptive influence would be injected into the executive branch. Then the employee would look to Congress and not have undivided loyalty to his superior in the executive branch.

Douglas at 74-75.

Prior to his appointment to the Court Justice Rehnquist was an Assistant Attorney General in the Department of Justice.

As head of the Department's Office of Legal Counsel he spoke out strongly in support of the necessity for Presidential confidentiality before the Senate Judiciary Committee:

Finally, in the area of Executive decisionmaking, it has been generally recognized that the President must be free to receive from his advisers absolutely impartial and disinterested advice, and that those advisers may well tend to hedge or blur the substance of their opinions if they feel that they will shortly be second-guessed by Congress, by the press, or by the public at large, or that the President might be embarrassed if he had to explain why he did not follow their recommendations. Again, the aim is not for secrecy of the end product -- the ultimate Presidential decision is and ought to be a subject of the fullest discussion and debate, for which the President must assume undivided responsibility. But few would doubt that the Presidential decision will be a sounder one if the President is able to call upon his advisers for completely candid and frequently conflicting advice with respect to a given question.

Executive Privilege: The Withholding of Information by the Executive, Hearing before the Subcommittee on Separation of Powers of the Committee on the Judiciary, U. S. Senate, 92nd Congress, 1st Session (1971) at 424-25.

Of course international relations and national defense have very special claims to secrecy, but the importance of the President being able to speak with his advisers "freely, frankly, and in confidence" is not confined to those matters. It is just as essential that the President be able to talk openly with his advisers about domestic issues as about military or foreign affairs. The wisdom that free discussion provides is as vital in fighting inflation, in choosing Supreme Court Justices, in deciding whether to veto a large spending bill, and in the myriad other important decisions that the President must make in his roles as Chief of State, Chief Executive, and Chief Legislator as it is when he is acting as Chief Diplomat or as Commander-in-Chief. Any other view would fragment the executive power vested in him and would assume that some of his constitutional responsibilities are more important than others. It is true that the President has

more substantive freedom to act in foreign and military affairs than he does in domestic affairs, but his need for candid advice is no different in the one situation than in the other.<sup>15</sup>

Former Justice Fortas, who advised President Johnson on both foreign and domestic matters, has said that a President must have "confidence that he can have advisers to whom he can trust his inmost thoughts. A President has to have this, just as a citizen can go to a doctor or a lawyer, a priest or a psychiatrist, to discuss his problems, without fear of disclosure of his confidences." Fortas, The Presidency As I have Seen It, In Hughes, The Living Presidency 335 (1973).<sup>16</sup>

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- 15 There are serious weaknesses in the assumption, popular among liberals who happen at the moment not to be thinking about Senator McCarthy, that public policy ought to draw a sharp distinction between "military and diplomatic secrets" on the one hand and all other types of official information on the other, giving Congress free access to the latter. In the first place, the line is by no means easy to draw, even when the best of faith is used \* \* \*. More fundamentally, however, the executive's interest in the privacy of certain other types of information is not less than its interest in preserving its military and diplomatic secrets. One obvious example is the data, derogatory or otherwise, in the security files of individuals. Another, perhaps still more important, is the record of deliberations incidental to the making of policy decision.

Bishop, The Executive's Right of Privacy: An Unresolved Constitutional Question, 66 Yale L. J. 477, 488 (1957).

- 16 This need has been perceived also by political scientists.

Although some of President Truman's "cronies" were poorly equipped for this service, their indiscretions did not destroy a President's need for personal adviser's \* \* \*. There can be no doubt that men like House and Hopkins perform an essential function. Ideally, they are both intimates of the President and experts in public affairs. But perhaps their most significant contributions are made as presidential intimates. The President needs to discuss with a sympathetic person ideas and plans that are still in an amorphous state and to gain some respite from the cares of office by talking over trivial matters that interest him or by chatting about men of affairs, with the confidence that his remarks will not go beyond the room.

Carr, Bernstein, Morrison, Snyder, & McLean, American Democracy in Theory and Practice 609-610 (1956).

All that we have said on this point was succinctly put by a distinguished constitutional lawyer, Charles L. Black, Jr., who has recently observed that refusal to disclose communications of the kind involved in this litigation is not only the President's lawful privilege, but

It is hard for me to see how any person of common sense could think that those consultative and decisional processes that are the essence of the Presidency could be carried on to any good effect, if every participant spoke or wrote in continual awareness that at any moment any Congressional committee, or any prosecutor working with a grand jury, could at will command the production of the verbatim record of every word written or spoken.

Black, Mr. Nixon, the Tapes and Common Sense, N. Y. Times, Aug. 3, 1973, p. 31. See also the fuller expression of Professor Black's view in Cong. Rec. E5320-E5322 (daily ed. August 1, 1973).

What we have said in this portion of the brief is frequently put on the basis of separation of powers. Yet it is probable that the point we have made goes beyond the separation of powers arguments and rests on a proposition even more fundamental. Even though no separation of powers issue would be involved, we suggest that it would be as inappropriate for one federal court to inquire into discussions between a judge of another federal court and his law clerk as it would be if the inquiry were to come from a committee of Congress. Similarly, we cannot conceive that one congressional committee could require production of the private papers of another congressional committee any more than a court could require these. What is really at stake is the ability of constitutional officers of government to perform their duties under conditions that will make it possible for them to function to the best of their ability. For this goal to be achieved, the ability to preserve the confidentiality of communications with close advisers is absolutely essential.

CONCLUSION

This litigation places the Judiciary in the unfortunate posture of being requested to settle a dispute between two of the coordinate branches of government. As set forth previously, it has been shown that this is a classic example of a political question, which is clearly inappropriate for judicial resolution. For this reason the case should be dismissed, because the subject matter is nonjusticiable.

Furthermore, the plaintiffs have asserted that the subpoenaed material is needed to determine whether perjury has been committed. Pursuing this objective is more the proper role of the Executive and Judicial branches than the Legislative, because it is between the former two that the law enforcement function of the Constitution is divided.

Finally, in response to the subpoenas of the Senate Committee, the President has interposed a valid claim of executive privilege. It is obvious that the President must be able to seek advice freely from his advisors in order to function satisfactorily. He must know that they can speak freely to him without fear of being summoned before some tribunal and forced to detail their conversations with him.

For all of the foregoing reasons, judgment should be entered on behalf of the President.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James St. Clair, hereby certify that on this 17th day of January, 1974, I have served the foregoing Amended Answer and Response to Plaintiffs' Memorandum on Remand on counsel for the plaintiffs by causing copies thereof to be hand-delivered to the office of

Samuel Dash  
Chief Counsel  
Senate Select Committee on  
Presidential Campaign  
Activities  
United States Senate  
Washington, D.C. 20510

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James St. Clair

THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES, et al.,

Plaintiffs

v.

RICHARD M. NIXON, individually and as  
President of the United States,

Defendant

FILED JAN 21 1974

JAMES F. DAVEY  
CLERK

Civil Action  
No. 1593-73

REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFFS'  
MEMORANDUM ON REMAND

Several things need initially be said about defendant's latest papers. First, defendant no longer seriously contends that Pub. Law 93-190 does not provide a valid statutory basis for jurisdiction in this case (Response, p. 2). Second, defendant has effectively dropped his claim that the Select Committee was not authorized by the full Senate to subpoena and sue the President -- a position wholly untenable after the passage of S. Res. 194. Instead, defendant essentially focuses on the issues of justiciability, plaintiffs' legislative authority, and the merits of this controversy, but his contentions in these regards are essentially repetitious of his prior arguments to this Court in this case and his unsuccessful arguments to this Court and the Court of Appeals in Nixon v. Sirica. Strangely, his contentions seem to miss the import of the significant events that have occurred since this matter was last briefed before this Court -- most particularly, the Court of Appeals' decision in Nixon v. Sirica and the unanimous passage of S. Res. 194. While we are hesitant to burden the Court with additional briefing, it appears necessary to bring this case back to proper perspective with a few brief remarks.



I. This Case Is Fully Justiciable.

Defendant's major claim respecting justiciability is that the Court should decline to decide this case because it involves a political question under the tests enunciated in Baker v. Carr, 369 U.S. 186 (1962) and Powell v. McCormack, 395 U.S. 486 (1969). We have not ignored these cases, as defendant contends (pp. 10, 11), but instead have demonstrated that, as to every aspect of the Baker/Powell test, his position is untenable. \*/ We do not propose to repeat those arguments in detail here, but a few additional comments are in order.

The Select Committee's decision to subpoena the President was not a "political decision" as defendant claims (p. 11). Rather, it was a unanimous decision by a bipartisan committee that, to fulfill its mandate under S. Res. 60, subpoenas to the President were required. Sec. 1 (a) of that Resolution, unanimously passed, instructs the Committee "to conduct an investigation and study of the extent ... to which illegal, improper, or unethical activities were engaged in by any persons ... in the presidential election of 1972, or in any related campaign or canvass..." (emphasis added). That the Committee was fulfilling its lawful responsibilities under S. Res. 60 by subpoenaing the President has been affirmed by a unanimous Senate in S. Res. 194.\*\*/ The assertion that the decision to subpoena the President was a political one is a mere ipse dixit. To state it does not make it so, particularly where uncontestable

\*/ See Plaintiffs' Reply Memorandum In Support of Motion For Summary Judgment, pp. 4-8. We there contend that there is no "textually demonstrable commitment" to the President by the Constitution of an unreviewable executive privilege to withhold evidence, a proposition firmly established by Nixon v. Sirica that serves as a lethal blow to defendant's claim of non-justiciability in this case. We have never conceded that the Constitution provides the Executive with an unreviewable privilege as defendant suggests (pp. 10, 14). We have noted the Courts' recognition that the Executive in certain circumstances has the right to keep materials confidential. This principle does not pertain when there is a prima facie case of criminality against the President and his close associates and the evidence sought relates to that possible criminality. (See section III, infra)

\*\*/ It is curious but significant that there is absolutely no mention of S. Res. 194 in defendant's entire 52-page brief.

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facts prove the contrary.\*/

Plaintiffs, of course, rely on Nixon v. Sirica for the principle that Courts have the power to review a claim of executive privilege. Defendant attempts to undercut this reliance by pointing out that this case involved a grand jury subpoena (p. 11).

But surely that decision has application beyond the confines of its immediate facts, as demonstrated by the following passage from the Court's opinion (p. 27).

"If the claim of absolute privilege was recognized, its mere invocation by the President or his surrogates could deny access to all documents in all the Executive departments to all citizens and their representatives, including Congress, the courts as well as grand juries, state governments, state officials and all state subdivisions. The Freedom of Information Act could become nothing more than a legislative statement of unenforceable rights. Support for this kind of mischief simply cannot be spun from incantation of the doctrine of separation of powers." (emphasis added).\*\*/

There is no reason why this Court should pronounce itself infirm to rule on a claim of privilege asserted against the Congress. The Supreme Court has said that the principle that "the public has a right to every man's evidence" is just as applicable to legislative investigations as to judicial proceedings,

United States v. Bryan, 339 U.S. 323, 331 (1950) thus indicating that a claim for evidence should not be unreviewable just because it is the Congress that asserts it. \*\*\*/

\*/ The President now says his decision to dishonor the subpoenas was political. We would have thought, upon reading his letters of refusal attached to our Complaint, that his noncompliance was based on supposed legal principles. In any event, the President cannot remove this case from the Court's jurisdiction by the mere assertion that his decision to reject the subpoenas was a political one.

\*\*/ Judge Wilkey in his dissent (p. 20) observed that "the Congressional demand for Executive papers (tapes) is 'logically indistinguishable from the demand on the Executive by Judicial subpoena, i.e., both test the Constitutional separation of powers basis of Executive privilege'. And he recognized (p. 71, fn 176) that the 'impact of the Courts' decision' would 'extend' to the present suit.

\*\*\*/ Judge MacKinnon, concurring in part and dissenting in part in Nixon v. Sirica, has recognized (p. 15) that a "Congressional subpoena ... carries at least as much weight as a judicial subpoena".

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The courts have recognized their power to rule on claims of executive privilege in suits for evidence brought by private parties. See United States v. Reynolds 345 U.S. 1 (1953) and Committee for Nuclear Responsibility, Inc. v. Seaborg, 149 U.S. App. D.C. 385, 463 F.2d 788, (1971), which were relied on by the Court in Nixon v. Sirica.\*/ One would suppose that the Congress, whose right as the representative of the people to information must be greater than that of a private party, would have at least have equal status before the Court. Moreover, the Courts have found authority to rule on claims of privilege asserted by the legislature against the executive, a task considerably more troublesome than the one here because of the specific provisions of the Speech and Debate Clause. See Gravel v. United States, 408 U.S. 606, 627 (1972);\*\*/ United States v. Brewster, 408 U.S. 501 (1972). It would thus be both unreasonable and unjust for the Court to decline to rule where, as here, the legislature seeks material from the executive.\*\*\*/ The Courts are thus accustomed to ruling on claims of privilege and, by the application of established legal standards -- i.e., the balancing test enunciated in Nixon v. Sirica -- this Court can likewise do so in the present case.\*\*\*\*/

\*/ See also, Soucie v. David, 144 U.S. App. D.C. 144, 149, n. 11, 448 F.2d 1067, 1072, n. 11 (1971).

\*\*/ Defendant at p. 6 cites Justice Douglas' dissent in Gravel for the one proposition that the Courts should not referee disputes between the two other branches, but his views in this respect were rejected by the majority of the Court that felt the case should be decided.

\*\*\*/ We know of no case holding that the Courts must relinquish their traditional role as the arbiter of claims of privilege where there is an assertion of executive privilege against the Congress.

\*\*\*\*/ The application of the balancing test in the present case is simplified because the Court now presumably has access to much of the material sought by the two subpoenas here involved since this material has been turned over to the grand jury in response to its subpoena or voluntarily. (The statements in the Response at pp. 10, 44 that all evidence herein sought has been turned over voluntarily to the grand jury are, of course, counterfactual.) It is significant that, in regards to the "Watergate" material in four conversations we have subpoenaed, the President raised no "particularized claim" of privilege in the Special Prosecutor's case after the Court of Appeals entered its order rejecting the President's broad assertion of an unreviewable executive privilege. Considering the Committee's need for this material, elsewhere detailed, the application of the balancing test to this material will thus be a simple exercise.

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Defendant suggests (p. 15) that this case is not justiciable because it involves a clash of power between two branches of government. But such a claim is decimated by reference to the Court of Appeals' decision in Nixon v. Sirica (p. 26) where the Court said that the fact that there is a conflict between coordinate branches of government

"... does not make the task of resolving the conflicting claims any less judicial in nature. Throughout our history, there have frequently been conflicts between independent organs of the federal government, as well as between the state and federal governments. When such conflicts arise in justiciable cases, our constitutional system provides a means for resolving them--one Supreme Court. To leave the proper scope and application of Executive privilege to the President's sole discretion would represent a mixing, rather than a separation, of Executive and Judicial functions. A breach in the separation of powers must be explicitly authorized by the Constitution, or be shown necessary to the harmonious operation of 'workable government.' Neither condition is met here."

We have previously cited numerous cases where the Courts have resolved controversies between coordinate branches of government. (See, e.g., Plaintiffs' Memorandum On Remand, p. 14). We add to that list this Court's recent decision in Nader v. Bork (C.A. No. 1954-73, November 11, 1973).

This case, therefore, is justiciable. It is, in fact, just the type of controversy that should be resolved by the ameliorating "neutral authority" of the judiciary (United States v. Brewster, *supra*, at 523) under its "responsibility...to act as the ultimate interpreter of the Constitution." (Powell v. McCormack, *supra*, at 549). Although this case is unique, it does not ask the Court to perform tasks foreign to it for which it has no standards, for the Courts in other contexts are accustomed to ruling on claims of executive privilege and deciding the validity of Congressional demands for evidence (e.g., in contempt cases).

What defendant has essentially done in his brief is to replay his old arguments respecting an unreviewable executive privilege that were unsuccessful in Nixon v. Sirica. They should be likewise unavailing here. \*/

\*/ The Court, of course, is only being asked to rule on the validity of the two subpoenas issued on July 23, 1973. The most recent subpoenas served by the Committee are not in issue here and may never be the subject of litigation. If litigation does result, it will involve only a limited number of the items sought by those subpoenas. We have previously dealt with defendant's claim that the second subpoena served on him on July 23, 1973, was overbroad and will not repeat our refutation of that assertion here. See Supplementary Memorandum p. 13, fn. \*/.

## II. Plaintiffs Have Not Exceeded Their Legislative Authority

Defendant's assertions that plaintiffs have gone beyond constitutional restrictions on their legislative authority are not totally clear. In his Amended Answer, par. 3, he "denies that plaintiffs are entitled to investigate criminal conduct." But in his Response (p. 18), he seems to assert that it is permissible "to identify" illegal conduct, but improper to explore its extent. Either contention is erroneous.

It is conclusively established that Congress may investigate criminal conduct. See McGrain v. Daugherty, 273 U.S. 135 (1927)\*/  
Sinclair v. United States, 279 U.S. 263 (1929) and the other cases cited at p. 6, our Supplementary Memorandum. We know of no case holding that a Congressional investigation into criminal conduct must cease once the conduct has been merely "identified," and we are confident there is none because such a ruling would debilitate Congressional investigations. It is significant that S. Res. 60 instructs the Committee "to conduct an investigation and study of the extent. . . to which illegal, improper, or unethical activities" occurred in the 1972 presidential campaign and election. (emphasis added)

In following this mandate, the Committee fulfills two vital legislative purposes. The first is the law-making function. Although the Committee as a whole has not yet considered or expressed itself on legislative recommendations, there are certain possible recommendations that may turn on the determination whether the President or his closest associates were involved in criminal conduct in the 1972 campaign. In such circumstances, it is possible that the Committee might consider a recommendation to limit presidential tenure to one term with restrictions on the President's participation in the campaign to choose his successor, or might proffer a drastic campaign finance bill severely curtailing the contribution of private monies. It is possible that the Committee might consider suggesting the establishment of a permanent special prosecutor,

\*/ In McGrain this Court sustained a Congressional investigation upon the determination that the administration of the Justice Department was a proper subject for legislation. It did not consider it necessary to engage in a minute examination of the evidence sought by the subpoena in question, which had been issued to the Attorney General's brother, to ascertain whether obtaining this evidence was critical for the enactment of legislation.

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immune from presidential removal, to prosecute election-related offenses. This special prosecutor might, by legislation, be given automatic access to all campaign and executive materials relating to the campaign. The General Accounting Office might also be provided similar access to such materials for auditing purposes. Or the Committee might undertake a review of certain federal criminal laws such as those concerning obstruction of justice and misprison of felony to ascertain whether they are adequate to deal with campaign conduct by executive officials.\*/

We could expand on these examples but perceive no need to do so. For the point is that, in the words of McGrain (p. 177), presidential elections are "[p]lainly [a subject] on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit," i.e., information respecting the possible participation in illegal acts by the President and his closest associates. \*\*/

The second legislative purpose the Committee is seeking to fulfill is its informing function. The Supreme Court has called the informing function "indispensable," and observed that it "should be preferred even to" Congress' law-making function.

See Watkins v. United States, 354 U.S. 178, 200, n. 33 (1957); United States v. Rumely, 345 U.S. 41, 43 (1953). \*\*\*/ Defendant's \*/ It is, of course, obvious that the other two major bodies investigating "Watergate"--the grand jury and the House Judiciary Committee--have no similar law-making mission.

\*/ This case is thus clearly distinguishable from Kilbourn v. Thompson, 103 U.S. 168 (1880) where the Court, for lack of proper legislative purpose, condemned an investigation into a private real estate pool, because here we have a subject under study concerning which legislation can and may result. The President, in fact, concedes (p. 24) that presidential campaigns are valid subjects for legislation.

Defendant makes much of our assertion that we desire to determine if perjury was committed before the Committee, suggesting that this is evidence that we are conducting a criminal trial. See Response, pp. 20, 52. Two points need be made to this. First, a legislative committee not concerned about the integrity of its own procedures would, at best, be foolish. Second, we hardly lay much stress on this point, dealing with it in a footnote in Plaintiffs' Memorandum On Remand, p. 22, and defendant's heavy focus on it demonstrates the paucity of his argument that the Committee proceeds without valid legislative purpose.

\*\*\*/ The informing function is most valuable when used to reveal governmental corruption. In fact, Watkins indicates that Congress can hold hearings to reveal government wrongdoing even if it has no immediate legislative intent--which the Committee, of course, does have. As the Court there said: "The public is, of course, entitled to be informed concerning the workings of its government." In ruling that "private" affairs could not be exposed "for the sake of exposure," the Court specifically indicated that it was, in that opinion, "not concerned with the power of the Congress to inquire into and publicize corruption, maladministration or inefficiency in . . . Government." See 354 U.S. at 200. (emph sis added)

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acknowledgement of the informing function is grudging and he claims that the Committee "has not been unduly frustrated in carrying out" this responsibility (p. 25). But it is just because defendant has not voluntarily provided the Committee with the best evidence available in order for it to fulfill its legislative missions that the Committee has been forced to subpoena and sue the President.\*/

Perhaps the most startling aspect of defendant's brief is that he totally ignores S. Res. 194. This resolution specifically states that it is the sense of the Senate that the Committee, in seeking the materials here involved, is acting with valid legislative purposes. Arguably, the full Congress is of that view else it would not have passed a statute giving jurisdiction for a suit to obtain this information. These Congressional determinations are entitled to great weight. See Plaintiffs' Memorandum on Remand, pp. 6-11. In light of these enactments and the discussion above regarding the Committee's law-making and informing functions, it is nigh impossible for the President to surmount the well-recognized presumption that a legislative committee is acting with valid legislative purposes.\*\*/ The Court should conclude that the Committee acts within its constitutional legislative authority.

\*/ It is possible that evidence submitted to the Special Prosecutor will never become public. The Special Prosecutor has recently speculated that all Watergate-related cases may be resolved by guilty pleas, a result that might seal material obtained by him from public scrutiny. See Washington Post p. A6, Col. 3-4, January 19, 1974.

\*\*/ See, e.g., McGrain v. Daugherty, *supra*, at 178; Watkins v. United States, *supra*, at 200; Barenblatt v. United States, 360 U.S. 109, 133 (1959).

### III. The Evidence Sought By The Committee May Not Be Suppressed

Defendant's defense on the merits is written almost as if Nixon v. Sirica had never been decided. After contending (pp. 26-7) that our reliance on that case is misplaced because it concerned a grand jury subpoena, the case is not significantly dealt with again. The balancing test promulgated in that case for determining whether a claim of executive privilege will be allowed is not even mentioned. Instead, defendant treats the Court to a generalized, largely irrelevant, and partially inaccurate discussion of the need for an executive privilege and the supposed history of its application. \*/

Nixon v. Sirica establishes the balancing test as the standard for resolution of all claims of executive privilege regardless against whom they are asserted. (See p. 28). We perceive no intimation in the language of that opinion that a different standard is applicable where a grand jury subpoena is not involved; to the contrary, the opinion relies heavily on non-grand jury cases such as Committee For Nuclear Responsibility v. Seaborg, supra. It is, however, not surprising that defendant attempts to avoid the balancing test for under it his claim of privilege is ill-fated.

Compelling factors weigh for disclosure of the materials here sought. The Committee has urgent need for the materials

\*/ This discussion is largely irrelevant because there is no real dispute here that executive confidentiality, in many circumstances, should be protected. It is inaccurate in several respects. As the Historical Appendix to our initial Memorandum shows, Presidents have often given Congress information requested by it, particularly where executive wrongdoing was under investigation. While they have also often refused to deliver information, there is no uniform usage or practice that would tend to establish a Constitutional principle of absolute executive privilege. (See Response, pp. 34-5). Moreover, it is simply not true that our Historical Appendix relies solely on Prof. Berger as defendant asserts (p. 29), as a cursory review of that document will establish. It is also not correct, as the quote at p. 4 suggests, that no heads of executive departments have ever responded to Congressional subpoenas. See, e.g., our Supplementary Memorandum, p. 10, fn. \*\*\*/.



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subpenaed to fulfill its law-making and informing functions. \*/ A unanimous Senate has stated in S. Res. 194 that the material subpenaed is "vital" to enable the Committee to fulfill its valid legislative obligations \*\*/ and it is arguable that the full Congress, by passage of P.L. 93-190 which aids the Committee in achieving the materials subpenaed, is also of that view. The President, himself, has acknowledged the importance of the material subpenaed by permitting voluminous testimony on the same subject matters.

There are, however, no significant factors that weigh in favor of suppression. While there is a general need to preserve presidential confidentiality as to official duties, no privilege is allowable to shield possible criminal conduct by the President.\*\*\*/ The same is true respecting the possible criminality of his associates.

This is not a case where evidence is sought "to investigate imagined 'executive wrongdoing'". See Response p. 44 (emphasis added). As we have heretofore asserted, and defendant's counsel

\*/ Judge MacKinnon, in his opinion in Nixon v. Sirica, observed (p. 15):

"[A] congressional subpoena issued for the purpose of obtaining facts upon which to legislate carries at least as much weight as a judicial subpoena issued for the purpose of obtaining evidence of criminal offenses. The only differences between these two types of subpoenas occur in the subject matter to which the subpoena power may be directed. Congressional subpoenas seek information in aid of the power to legislate for the entire nation while judicial subpoenas seek information in aid of the power to adjudicate controversies between individual litigants in a single civil or criminal case. A Grand jury subpoena seeks facts to determine whether there is probable cause that a criminal law has been violated by a few people in a particular instance. A congressional subpoena seeks facts which become the basis for legislation that directly affects over 200 million people. Thus, both congressional and judicial subpoenas serve vital interests, and one interest is no more vital than the other."

\*/ This official declaration by the unanimous Senate outweighs the random remarks by Senators Inouye and Gurney, both of whom introduced the Resolution (see Response p. 19). Senator Inouye's statement was that the Committee could write an "adequate" report if the materials subpenaed were not produced. The Committee, however, desires to present a report of exceptionally high standard containing solid legislative recommendations. The nation deserves no less in the critical area of election reform.

\*\*\*/ Defendant concedes this point of law. See Plaintiffs' Memorandum On Remand, p. 25.

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not denied, the evidence before the Committee presents a prima facie case that the President himself has been involved in criminal conduct. See Plaintiffs' Reply Memorandum In Support Of Motion For Summary Judgment, p. 19. There is also, for example, a prima facie case that Haldeman, Ehrlichman and Mitchell, three of the President's closest advisors, committed crimes. And John Dean, whose conversations with the President are the subject of certain tape recordings here sought, has already pleaded guilty to a conspiracy to obstruct justice. In such circumstances, executive privilege cannot be invoked to suppress information bearing on possible criminality. \*/

Moreover, by permitting testimony and the revelation of evidence respecting the subject matters of certain materials under subpoena, the President has severely diminished any supposed public interest in keeping this material confidential. See Nixon v. Sirica, pp. 31-2. As the Court of Appeals said respecting the tapes under subpoena: "The simple fact is that the conversations are no longer confidential." (emphasis added) This statement is all the more trenchant today regarding the materials now turned over to the grand jury. \*\*/ It is also significant that, as to some such materials--including the "Watergate" portions of four conversations subpoenaed by this Committee--the defendant raised no "particularized claim" of privilege after his broad

---

\*/ Because of the nature of the subject matter under investigation, it is unconvincing for defendant to contend that "[t]his case concerns the ability of the President to enjoy confidentiality in carrying out his official duties" (p. 40). It is also difficult to accept the statement (p. 51) that "[w]hat is really at stake is the ability of constitutional officers of government to perform their duties under conditions that will make it possible for them to function to the best of their ability." A decision for plaintiffs in this case would in no way hinder the future legitimate exercise of official duties by executive personnel.

\*\*/ Defendant, in his brief to the Court of Appeals in Nixon v. Sirica, recognized at p. 63 that when these materials were released to the grand jury "all confidentiality would be ended."

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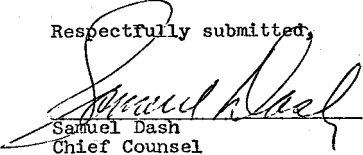
claim of absolute, unreviewable privilege was rejected.\*

Finally, there is no public interest in allowing the President to toy with the Committee and the public by revealing what information he desires, while he withholds the best evidence. His claim of cooperation at pp. 25-6 should not obscure the fact that he intends to leave the Committee plagued by the contradictions that remain after the testimony before it by his present and former aides. This action is contrary to our fundamental notions of fairness and, if allowed to succeed, can only result in a distorted version of the facts.

#### Conclusion

Plaintiffs' motion for summary judgment should be granted.

Respectfully submitted,

  
Samuel Dash  
Chief Counsel

Fred D. Thompson  
Minority Counsel

Rufus Edmisten  
Deputy Counsel

James Hamilton  
Assistant Chief Counsel

Richard Stewart  
Special Counsel

Ronald D. Rotunda  
Assistant Counsel

Donald S. Burris  
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United States Senate  
Washington, D.C. 20510  
Telephone Number 225-0531

Attorneys for Plaintiffs

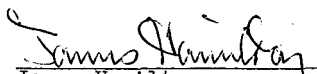
Sherman Cohn  
Eugene Gressman  
Jerome A. Barron  
Washington, D.C.  
Of Counsel

Arthur S. Miller  
Chief Consultant to  
the Select Committee  
Of Counsel

\* Defendant does not deal in his brief with our arguments respecting his diminished interest in maintaining the confidentiality of the materials under subpoena except in a footnote on p. 30 where he employs his shopworn arguments based on United States v. Reynolds, 345 U.S. 1 (1953) and the views of Prof. Alexander Bickel. His position in this regard, however, has been thoroughly discredited by the Court of Appeals decision in Nixon v. Sirica.

CERTIFICATE OF SERVICE

I, James Hamilton, do hereby certify that on January 21, 1974, I served copies of the attached Reply To Defendant's Response To Plaintiffs' Memorandum On Remand upon defendant President by having said copies hand-delivered to the offices of his counsel in the Executive Office Building, Pennsylvania Avenue, Washington, D.C.

  
James Hamilton  
Assistant Chief Counsel  
United States Senate  
Washington, D.C. 20510

Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON  
PRESIDENTIAL CAMPAIGN ACTIVITIES,  
SUING IN ITS OWN NAME AND IN THE  
NAME OF THE UNITED STATES, ET AL.,

Plaintiffs,

v.

RICHARD M. NIXON, INDIVIDUALLY AND  
AS PRESIDENT OF THE UNITED STATES,

Defendant.

Civil Action No. 1593-73

O R D E R

On consideration of the President's objections to the attached subpoena duces tecum issued by the Senate Select Committee on July 23, 1973, the Court has concluded that the demand therein for all conceivable types of documents, recordings and photographs relating directly or indirectly to the activities, participation, responsibilities or involvement of 25 named individuals in any allegedly criminal acts relating to the 1972 Presidential campaign is too vague and conclusory to permit a meaningful response, overlooks the restraints of specificity and reasonableness which derive from the Fourth Amendment and is wholly inappropriate given the stringent requirements applicable where a claim of executive privilege has been raised. Nixon v. Sirica, Nos. 73-1962, 73-1967, 73-1989, at 28-33 (D.C. Cir. Oct. 12, 1973). See also McPhaul v. United States, 364 U.S. 372, 382-83 (1960); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 208-09 (1946); See v. City of Seattle, 387 U.S. 541, 544 (1967); In re Grand Jury Subpoena Duces Tecum, 203 F. Supp. 575, 577-79 (S.D.N.Y. 1961), and cases cited therein. The subpoena is accordingly quashed and the Committee's prayer for its enforcement denied.

SO ORDERED.

January 25, 1974.

  
UNITED STATES DISTRICT JUDGE

Exhibit D  
1593-73UNITED STATES OF AMERICA  
CONGRESS OF THE UNITED STATES **FILED**  
SUBPOENA DUCES TECUM AUG 9 1973

JAMES E. DAVEY, Clerk

To: President Richard M. Nixon, The White House, Washington, D. C.

Pursuant to lawful authority, YOU ARE HEREBY COMMANDED to make available to the SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES of the Senate of the United States, on Thursday, July 26, 1973, at 10:00 o'clock a.m., at their committee room, 318, Old Senate Office Building, the following:

Any and all records, or copies of records including but not limited to, documents, logs, records, memoranda, correspondence, news summaries, datebooks, notebooks, photographs, recordings or other materials relating directly or indirectly to the attached list of individuals and to their activities, participation, responsibilities or involvement in any alleged criminal acts related to the Presidential election of 1972 which the Committee is authorized to investigate pursuant to Senate Resolution 60 including but not limited to, the break-ins of the Democratic National Committee offices on or about May 27, 1972 and on or about June 17, 1972, the surveillance, electronic or otherwise of said offices, and efforts made to conceal information or to grant executive clemency, pardons or immunity and payments made to the defendants and/or their attorneys relating to the above stated matters.

WED 3 23 1903  
FILED

Hereof fail not, as you will answer your default under the  
pains and penalties in such cases made and provided.

TO Rufus L. Edmisten, TERRY F. LINDELL  
to serve and return.

Given under my hand, by order of the  
committee, this 23rd day of July, in  
the year of our Lord one thousand nine  
hundred and seventy-three

Sam J. Erwin Jr.

Chairman, Senate Select Committee on  
Presidential Campaign Activities.

Buchanan, Patrick J.

Butterfield, Alexander P.

Campbell, John

Caulfield, Jack

Chapin, Dwight

Colson, Charles

Dean, John

Ehrlichman, John

Fielding, Fred

Haldeman, H. Robert

Higby, Larry

Howard, Richard

Hunt, E. Howard

Kehrli, Bruce

Krogh, Egil

LaRue, Frederick

Liddy, G. Gordon

Magruder, Jeb Stuart



Mitchell, John

Moore, Richard A.

Shumway, DeVan

Strachan, Gordon

Timmons, William

Young, David

Ziegler, Ron

Served on: ~~James Garment~~ <sup>Presented</sup> ~~received~~ <sup>on</sup>  
 Time: 6:35 <sup>behalf of the President</sup>  
 Date: July 23, 1973  
 Place: ~~The White~~ Executive Office Building  
 White House

Rufus T. Edmonies  
Jerry F. Long  
 7/23/73

Received on behalf of the President  
 By: James Garment  
 Counsel to the President

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON  
PRESIDENTIAL CAMPAIGN ACTIVITIES,  
SUING IN ITS OWN NAME AND IN THE  
NAME OF THE UNITED STATES, ET AL.,

Plaintiffs,

v.

RICHARD M. NIXON, INDIVIDUALLY  
AND AS PRESIDENT OF THE UNITED STATES,

Defendant.

Civil Action No. 1593-73

O R D E R

The Court, upon consideration of the briefs, pleadings and other papers filed with regard to the attached subpoena duces tecum issued by the Senate Select Committee on Presidential Campaign Activities for the production of five specifically designated tape recordings of presidential conversations, finds that the President's claim of executive privilege, set forth generally in three letters to the Chairman of the Select Committee dated July 6, 23 and 25, 1973, is too general and not sufficiently contemporaneous to enable the Court to determine the effect of that claim under the doctrine of Nixon v. Sirica, Nos. 73-1962, 73-1967, 73-1989, at 28-33 (D.C. Cir. Oct. 12, 1973), decided subsequent to the letters and initial proceedings in this case. Accordingly, the Court respectfully requests that the President submit, through counsel, on or before February 6, 1974, a particularized statement addressed to specific portions of the subpoenaed tape recordings indicating whether he still wishes to invoke executive privilege as to these tapes and, with regard to those portions as to which the privilege is still asserted, if any, the factual ground or grounds for his determination that

-2-

disclosure to the Select Committee would not be in the public interest. This statement must be signed by the President, for only he can invoke the privilege at issue, United States v. Burr, 25 Fed. Cas. 187 (Case No. 14,694), 192 (1807), and will be made part of the public record in this case. If the President so desires, the Court will also review, in camera and ex parte, transcripts of any tape recordings referred to in the President's statement and will take them into consideration in determining the sufficiency of the privilege claimed, provided that such transcripts are submitted with the requested statement.

SO ORDERED.

  
UNITED STATES DISTRICT JUDGE

January 25, 1974.

Exhibit C

UNITED STATES OF AMERICA  
CONGRESS OF THE UNITED STATES  
SUBPOENA DUCES TECUM

1593-73

FILED

AUG 9 1973

JAMES F. DAVEY, Clerk

To: President Richard M. Nixon, The White House, Washington, D. C.

Pursuant to lawful authority, YOU ARE HEREBY COMMANDED  
to make available to the SENATE SELECT COMMITTEE ON  
PRESIDENTIAL CAMPAIGN ACTIVITIES of the Senate of the United  
States, on Thursday, July 26, 1973, at 10:00 o'clock a.m., at their  
committee room, 318, Old Senate Office Building, the following:

Any and all original electronic tapes and recorded telephone  
messages of the below listed conversations or oral communications,  
telephonic or personal, between President Nixon and John Wesley  
Dean III, discussing alleged criminal acts occurring in connection with  
the Presidential election of 1972 which the Committee is authorized to  
investigate pursuant to Senate Resolution 60 including but not limited to  
the break-ins at the Democratic National Committee offices on or about  
May 27, 1972, and on or about June 17, 1972, and any efforts made to  
conceal information or to grant executive clemency, pardons or immunity  
and payments made to the defendants and/or their attorneys relating to the  
above incidents at the dates and times of the attached list of conversations:

VOLUME 800

EFILED

JUL 27 1973

September 15, 1972 (personal) 5:27 p.m. to 6:17 p.m.

February 28, 1973 (personal) 9:12 a.m. to 10:23 a.m.

March 13, 1973 (personal) 12:42 p.m. to 2:00 p.m.

March 21, 1973 (personal) 10:12 a.m. to 11:55 a.m.

and 5:20 p.m. to 6:01 p.m.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

To Rufus L. Edmisten, JERRY F. LEWIS  
to serve and return.

Given under my hand, by order of the  
committee, this 23rd day of July, in the  
year of our Lord one thousand nine hundred  
and seventy-three.

Sam H. Eason, Jr.

Chairman, Senate Select Committee on  
Presidential Campaign Activities

SERVED ON LEONARD GARMENT, ON behalf of  
The President,

Time: 6:15

Date: July 23, 1973

Place: Executive Office Bldg, White House

Richard L. Edmister

James B. Longue

7/23/73

Received on behalf of the President  
By: Leonard Garmet  
Council to the President

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON )  
PRESIDENTIAL CAMPAIGN ACTIVITIES, )  
SUING IN ITS OWN NAME AND IN THE )  
NAME OF THE UNITED STATES, ET AL., )

Plaintiffs, )

v. )

Civil Action No. 1593-73

RICHARD M. NIXON, INDIVIDUALLY AND )  
AS PRESIDENT OF THE UNITED STATES, )

Defendant. )

O R D E R

The Court respectfully requests the Watergate Special Prosecutor to file with the Court and serve upon all parties, by February 6, 1974, a statement concerning the effect, if any, that compliance with the attached subpoena issued by the Senate Select Committee on Presidential Campaign Activities would, in his opinion, be likely to have upon pending criminal cases or imminent indictments under his supervision.

SO ORDERED.

  
UNITED STATES DISTRICT JUDGE

January 25, 1974.



Exhibit C

UNITED STATES OF AMERICA  
 CONGRESS OF THE UNITED STATES  
 SUBPOENA DUCES TECUM

1593-73

**FILED**

AUG 9 1973

JAMES F. DAVEY, Clerk

To: President Richard M. Nixon, The White House, Washington, D. C.

Pursuant to lawful authority, YOU ARE HEREBY COMMANDED  
 to make available to the SENATE SELECT COMMITTEE ON  
 PRESIDENTIAL CAMPAIGN ACTIVITIES of the Senate of the United  
 States, on Thursday, July 26, 1973, at 10:00 o'clock a.m., at their  
 committee room, 318, Old Senate Office Building, the following:

Any and all original electronic tapes and recorded telephone  
 messages of the below listed conversations or oral communications,  
 telephonic or personal, between President Nixon and John Wesley  
 Dean III, discussing alleged criminal acts occurring in connection with  
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 investigate pursuant to Senate Resolution 60 including but not limited to  
 the break-ins at the Democratic National Committee offices on or about  
 May 27, 1972, and on or about June 17, 1972, and any efforts made to  
 conceal information or to grant executive clemency, pardons or immunity  
 and payments made to the defendants and/or their attorneys relating to the  
 above incidents at the dates and times of the attached list of conversations:

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 and 5:20 p.m. to 6:01 p.m.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

To Rufus L. Edmisten, HARRY F. LORRAIN  
 to serve and return.

Given under my hand, by order of the  
 committee, this 23rd day of July, in the  
 year of our Lord one thousand nine hundred  
 and seventy-three.

Sam J. Erwin, Jr.  
 Chairman, Senate Select Committee on  
 Presidential Campaign Activities

SERVED ON LEONARD GARMENT, ON behalf of  
The President.

Time: 6:15

Date: July 23, 1973

Place: Executive Office Bldg. White House

Regis L. Edmundson

Jerry B. Longue

7/23/73

Received on behalf of the President  
By: Leonard Garment  
Counsel to the President

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON )  
PRESIDENTIAL CAMPAIGN )  
ACTIVITIES, SUING IN ITS )  
OWN NAME AND IN THE NAME OF )  
THE UNITED STATES, et al., )

Plaintiffs, )

v. )

Civil Action No. 1593-73

RICHARD M. NIXON, INDIVIDU- )  
ALLY AND AS PRESIDENT OF THE )  
UNITED STATES, )

Defendant. )

MEMORANDUM OF THE SPECIAL PROSECUTOR

The Special Prosecutor submits this memorandum pursuant to the order of the Court on January 25, 1974, requesting that the Special Prosecutor file with the Court and serve upon the parties "a statement concerning the effect, if any, that compliance with the [subpoena of the Senate Select Committee on Presidential Campaign Activities for five recordings of Presidential conversations] would, in his opinion, be likely to have upon pending criminal cases or imminent indictments under his supervision."

BACKGROUND

The grand jury empanelled in the District of Columbia on June 5, 1972, has been investigating the so-called Water-gate break-in and cover-up for more than nineteen months. This investigation already has resulted in pleas of guilty by three persons -- John W. Dean III, Frederick LaRue and Jeb Stuart Magruder -- to one-count informations charging a

conspiracy to obstruct justice and defraud the United States in violation of 18 U.S.C. 371. A fourth person -- Herbert Porter -- has pleaded guilty to making false statements to the Federal Bureau of Investigation in connection with the Watergate investigation, in violation of 18 U.S.C. 1001. And a fifth -- Dwight Chapin -- is now awaiting trial in this Court on four counts of making false statements to the June 1972 Grand Jury, in violation of 18 U.S.C. 1623.

The Special Prosecutor expects that the June 1972 Grand Jury will complete its investigation and return any indictments prior to March 1974. Based upon the public testimony of those individuals who have pleaded guilty, as well as other testimony before the Senate Select Committee on Presidential Campaign Activities, it is only reasonable to assume, as the Court implicitly recognizes in its Order, that indictments in fact will be forthcoming.<sup>1/</sup>

In this regard, we should advise the Court that four of the recordings subject to the Senate Select Committee subpoena have been played before the grand jury. The grand jury received these recordings pursuant to its own subpoena duces tecum enforced by Chief Judge Sirica in an order upheld by the Court of Appeals. Nixon v. Sirica, No. 73-1962 (D.C. Cir. October 12, 1973). These recordings will be important

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<sup>1/</sup> The Special Prosecutor, who is charged with investigating "allegations involving the President, members of the White House staff, or Presidential appointees" (Order of the Attorney General No. 551-73; November 2, 1973), also has been presenting evidence to the grand juries empanelled on August 13, 1973, and January 7, 1974. In addition to the indictment of Egil Krogh, Jr., for false statements (subsequently dismissed when Mr. Krogh pleaded guilty to a civil rights conspiracy) and the indictment of Dwight Chapin mentioned above, it is expected that these grand juries also will return indictments in the near future.

and material evidence at any future trials resulting from the grand jury's investigations, a factor that must be taken into account in assessing the effect of compliance with the Senate Select Committee subpoena.

#### STATEMENT

The Supreme Court has described the right to a fair trial as "the most fundamental of all freedoms" which "must be maintained at all costs." Estes v. Texas, 381 U.S. 532, 540 (1965). The Special Prosecutor, consistent with his obligation to ensure the integrity of the criminal process and afford all defendants a fair trial, repeatedly has sought to prevent or minimize improper, unwarranted or inflammatory pre-trial publicity.<sup>2/</sup> It is thus incumbent on the Special Prosecutor to inform the Court that, in his judgment, compliance with the Senate Select Committee subpoena and subsequent airing of the recordings during hearings of the Committee would increase the risk that those indicted could contend

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<sup>2/</sup> For example, when the Senate Select Committee sought to immunize witnesses Dean and Magruder to obtain their testimony, the Special Prosecutor asked the Court to impose conditions on the grant of immunity, suggesting that the Court might require the exclusion of the broadcast media when the witnesses testified or might require that the witnesses testify in executive session. See "Memorandum on Behalf of the Special Prosecutor on Application for Orders Conferring Immunity", Application of United States Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1270 (D.D.C. 1973). Similarly, the Special Prosecutor opposed the request of the Democratic National Committee for access to grand jury materials and investigatory files in connection with its civil action arising out of the Watergate break-in, and suggested the sealing of any depositions taken of key Watergate figures. See "Response of the United States to the Motion of Plaintiffs for the Production and Inspection of Grand Jury Minutes and for the Production and Inspection of Documents and for Leave to Depose Persons in Prison", Democratic National Committee v. McCord, Civ. No. 1233-72 (D.D.C.).

In addition, the Special Prosecutor has asked that the Senate Select Committee defer filing any fact-finding report until after the pertinent indictments and trials.

with more force than presently available that widespread pre-trial publicity prevents the Government from empanelling an unbiased jury for the trial of the offenses charged, particularly if compliance comes while the defendants are actually under indictment.<sup>3/</sup> See, e.g., Delaney v. United States, 199 F.2d 107 (1st Cir. 1952).

But the existence of pre-trial publicity, even widespread publicity, does not support, ipso facto, a claim of prejudicial publicity or require the trial court to take remedial action such as granting a continuance or change of venue. The courts "are not concerned with the fact of publicity but with the assessment of its nature." Silverthorne v. United States, 400 F.2d 627, 631 (9th Cir. 1968), cert. denied, 400 U.S. 1022 (1971). At this time it is impossible to assess the precise impact of such publicity on forthcoming trials, but the following factors should be considered:

First, the degree of publicity generated if there is compliance with the subpoena will depend on how the Senate Select Committee uses the recordings. If the Court holds that the Senate Select Committee subpoena is valid and enforceable, it might be appropriate for the Court to consider imposing reasonable conditions on the use of the recordings or securing voluntary assurance that such restraint will be observed. The Supreme Court has directed trial courts to take all necessary action to "protect their processes from prejudicial outside interferences" which pre-trial publicity

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<sup>3/</sup> As indicated above, the Special Prosecutor expects that indictments will be returned during February. Even if this Court enforces the Senate Select Committee's subpoena, it can be expected that the Court's order will be stayed pending appeals, perhaps through the Supreme Court. Thus it appears unrealistic to expect a final order, and compliance therewith, prior to the return of indictments.

may inject into criminal proceedings. Sheppard v. Maxwell, 384 U.S. 333, 363 (1966). Since the Senate Select Committee has invoked this Court's jurisdiction to enforce its subpoena, the Court may have discretion -- subject only to limitations of the separation of powers -- to protect fundamental constitutional interests. Cf. Krippendorf v. Hyde, 110 U.S. 276, 283 (1884). On the separation of powers issue, see generally Doe v. McMillan, 93 S. Ct. 2018 (1973); Powell v. McCormack, 395 U.S. 486 (1969). But cf. Application of United States Senate Select Committee on Presidential Campaign Activities, supra.

Second, any publicity stemming from compliance with the subpoenas would add only marginally to previous publicity. In addition, the publicity, as all prior publicity, will be largely factual. It must be remembered, the issue presented to the courts is not whether a prospective juror is ignorant of the allegations surrounding a prosecution, or even whether he may have some impression about them, but whether "the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Irvin v. Dowd, 366 U.S. 717, 723 (1961). Compare Sheppard v. Maxwell, supra; Rideau v. Louisiana, 373 U.S. 723 (1963).

Third, the material being sought by the Senate Select Committee is of a unique kind. The publicity that already has been generated about Watergate has involved frequently conflicting versions of what was said at particular meetings in the White House. Naturally, that dispute has been of considerable public interest and concern and all of the participants have presented publicly their versions of what transpired, either in sworn testimony or in press releases or news conferences. As the Court of Appeals has held with



respect to the subpoenaed tapes, however, the tapes constitute "the best evidence of the conversations available." Nixon v. Sirica, supra (slip op. at 32). See also United States v. White, 401 U.S. 745, 753 (1971).

• We are confident that notwithstanding prior publicity, if jurors are selected with the care required by the decisions in this Circuit, all defendants will receive a fair and prompt trial. Against this background, the Special Prosecutor can say no more than that compliance with the subpoena might provide prospective defendants with one more discrete incident to cite in support of a claim of prejudicial pre-trial publicity. Accordingly, we take no position on whether the Court, if the Senate Select Committee subpoena is otherwise enforceable, should consider the danger of prejudicial pre-trial publicity a decisive factor.<sup>4/</sup>

Finally, if the Court decides to direct compliance with the Committee's subpoena, the Special Prosecutor suggests that compliance be limited specifically to delivery of copies, and not the original recordings.<sup>5/</sup> As indicated above, the

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<sup>4/</sup> In Nixon v. Sirica, supra, the court of appeals held that the President's generalized claim of executive privilege is not absolute and "depends on a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case" (slip op. at 28). There, the court held that the privilege "must fail in the face of the uniquely powerful showing made by the Special Prosecutor in this case" (slip op. at 30). This "uniquely powerful showing" was based on the "vital function" of the grand jury. Thus, the grand jury's subpoena was enforced because of the paramount public interest in the full and fair investigation of allegations of criminal misconduct by high government officials (slip op. at 31). Clearly, the effect that compliance with another subpoena would have on the integrity of this same investigation must be taken into account in determining whether the public interest lies in sustaining or overruling a claim of privilege in a different context.

<sup>5/</sup> Four of the original recordings, which were subpoenaed by the grand jury, are now in the custody of the District Court, pursuant to the request of Chief Judge Sirica. The White House apparently retains custody of the fifth, the recording of the meeting on February 28, 1973, which was not subpoenaed by the grand jury.

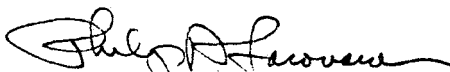
Special Prosecutor intends to introduce these recordings in evidence at any future trials and, thus, it is essential to maintain, insofar as possible, the authenticity and integrity of the original recordings. Delivery of the originals, at a minimum, would create evidentiary problems, including proof of the chain of custody. Also, since each reel of tape includes six hours of recording, far more than those portions subject to the subpoena, delivery of the original would necessitate excising all non-subpoenaed portions from the original. This would create obvious evidentiary problems. Exact copies of the subpoenaed portions, on the other hand, would satisfy fully the needs of the Senate Select Committee.

The foregoing statement is filed for whatever assistance it may furnish to the Court.

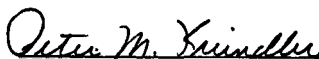
Respectfully submitted.



LEON JAWORSKI  
Special Prosecutor



PHILIP A. LACOVARA  
Counsel to the Special  
Prosecutor



PETER M. KREINDLER  
Executive Assistant to  
the Special Prosecutor

Watergate Special Prosecution Force  
1425 K Street, N. W.  
Washington, D. C. 20005

Attorneys for the United States

DATED: February 6, 1974

CERTIFICATE OF SERVICE

I, Peter M. Kreindler, certify that a copy of the foregoing Memorandum Of The Special Prosecutor was hand delivered on this 6th day of February, 1974, to the following:

James D. St. Clair, Esq.  
Special Counsel to the  
President  
The White House  
Washington, D. C.

Samuel Dash, Esq.  
Chief Counsel  
United States Senate  
Select Committee on Presidential  
Campaign Activities  
Washington, D. C.

  
\_\_\_\_\_  
PETER M. KREINDLER

THE WHITE HOUSE  
WASHINGTON

February 6, 1974

Dear Judge Gesell:

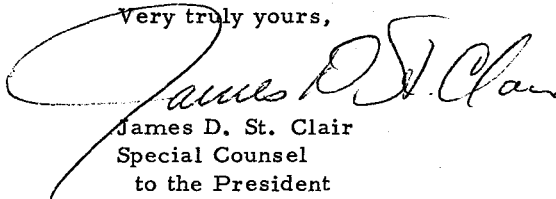
Re Senate Select Committee et al. v. Nixon  
Civil Action No. 1593-73

I enclose herewith the President's response to your order of January 25, 1974, in the above entitled proceeding.

I have received a copy of the memorandum of the Special Prosecutor in which he states that four of the recordings described in the Senate Select Committee subpoena were received pursuant to the Special Prosecutor's subpoena.

I believe your Honor should also be aware that the fifth recording was requested of White House Counsel by the Special Prosecutor and was furnished him for the purpose submitting the same to the Grand Jury.

Very truly yours,



James D. St. Clair  
Special Counsel  
to the President

Honorable Gerhard Gesell  
United States Courthouse  
Washington, D. C. 20001

CC: Honorable Leon Jaworski

## THE WHITE HOUSE

WASHINGTON

February 6, 1974

Dear Judge Gesell:

I have been advised by Special Counsel to the President of the order issued by you on January 25, 1974, in which you solicited my personal response with reference to five specified taped conversations.

As indicated in the various briefs, pleadings and other papers filed in this proceeding, it is my belief that the issue before this Court constitutes a non-justiciable political question.

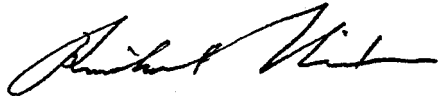
Nevertheless, out of respect for this Court, but without in any way departing from my view that the issues presented here are inappropriate for resolution by the Judicial Branch, I have made a determination that the entirety of the five recordings of Presidential conversations described on the subpoena issued by the Senate Select Committee on Presidential Campaign Activities contains privileged communications, the disclosure of which would not be in the national interest.

I am taking this position for two primary reasons. First, the Senate Select Committee has made known its intention to make these materials public. Unlike the secret use of four out of five of these conversations before the grand jury, the publication of all of these tapes to the world at large would seriously infringe upon the principle of confidentiality, which is vital to the performance of my Constitutional responsibilities as President.

Second, it is incumbent upon me to be sensitive to the possible adverse effects upon ongoing and forthcoming criminal proceedings should the contents of these subpoenaed conversations be made public at an inappropriate time. The dangers

connected with excessive pre-trial publicity are as well-known to this Court as they are to me. Consequently, my Constitutional mandate to see that the laws are faithfully executed requires my prohibiting the disclosure of any of these materials at this time and in this forum.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard A. Posner". The signature is fluid and cursive, with a long horizontal stroke at the end.

The Honorable Gerhard A. Gesell  
Judge  
U. S. District Court  
for the District of Columbia  
Washington, D.C.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL  
CAMPAIGN ACTIVITIES, et al.

Plaintiffs

v.

RICHARD M. NIXON, individually and as  
President of the United States

Defendant

Civil Action  
No. 1593-73

FILED

FEB -7 1974

JAMES F. DAVEY  
CLERK

PLAINTIFFS' OBSERVATIONS ON THE  
PRESIDENT'S LETTER AND THE  
SPECIAL PROSECUTOR'S MEMORANDUM

I. The President's Letter

In its order of January 25, 1974, the Court, being of the view that the President's claim of executive privilege was "too general", respectfully requested the President to "submit . . . a particularized statement addressed to specific portions of the subpoenaed tape recordings indicating . . . with regard to those portions as to which the privilege is still asserted, . . . the factual ground or grounds for his determination that disclosure to the Select Committee could not be in the public interest". The President has failed to present the "particularized statement" called for by that order. Instead, he relies primarily on the generalized claim that disclosure of the five conversations under subpoena would not be in the national interest.

To support this generalized claim the President makes two points, neither of which is persuasive. First, he says that "publication of all these tapes to the world at large would seriously infringe upon the principle of confidentiality, which is vital to the performance of my Constitutional responsibilities as President". This statement hardly qualifies as a "particularized statement" as to why disclosure

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is not in the public interest and, in any event, is highly suspect because the President has already allowed his present and former aides to breach repeatedly the supposed confidentiality of these conversations. The President, himself, has publicly commented on the contents of certain of these conversations and, just recently, has allowed his aides to show purported transcripts of certain conversations under subpoena to Senator Scott who apparently was free to comment publicly on their contents, as he in fact has done.\*/

Thus, the import of the President's assertion is that it is in the "national interest" to withhold the best evidence while he permits inferior accounts of the contents of the tapes to emerge. We quarrel with this concept of the "national interest" and instead submit that informing the public of the contents of the tapes is in the public interest for the people have a right to know if their government has been corrupted.\*\*/

Secondly, the President puts forth his concern as to the "dangers" of excessive pretrial publicity as a reason for asserting executive privilege. There is, of course, some question whether this concern presents a valid ground for invoking executive privilege since "[t]his privilege [is] intended to protect the effectiveness of the executive decision-making powers" (Nixon v. Sirica, p. 29), rather than to safeguard criminal trials. In any event, this assertion is both belated and unconvincing now that the President and his present and former aides, with his permission, have spread voluminous evidence regarding the conversations at

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\*/See, e.g., Washington Post, Feb. 2, 1974, p. A-15, col. 1-4. As the Court of Appeals said in Nixon v. Sirica (p. 32): "The simple fact is that the conversations are no longer confidential".

\*\*/As the President must realize, turning the tapes over to the Special Prosecutor may result in their contents being publicly revealed at trial. Thus the distinction the President attempts to make between revelation to a grand jury, whose proceedings are in secret, and disclosure to the Committee, whose hearings are frequently open, rests on flimsy grounds.



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issue on the public record. It is noteworthy that the President's statement on pretrial publicity is considerably stronger than the Special Prosecutor's, who is specifically entrusted with the Watergate prosecutions and takes no position as to whether the Court should consider the possibility of pretrial publicity as a decisive factor in its decision whether compliance with the subpoena is in order. In fact, the Special Prosecutor affirmatively states that he is confident that fair trials respecting the Watergate affair will be had.

The President, therefore, has submitted no "particularized reason" why the Watergate portions of the tapes subpoenaed should not be produced. Moreover, he raised no "particularized reason" for executive privilege in the Grand Jury proceeding as to the four conversations there involved that are also under subpoena here.\*/ Accordingly, under the balancing test promulgated in Nixon v. Sirica, the judgment of the Court must be in plaintiffs' favor.\*\*/

## II. The Special Prosecutor's Statement

The essence of the Special Prosecutor's response to the Court's January 25, 1974 order is contained in the following paragraph:

"We are confident that notwithstanding prior publicity, if jurors are selected with the care

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\*/Mr. St. Clair, the President's Counsel, asserts in his February 6 letter to the Court that the February 28 tape was submitted to the Special Prosecutor for Grand Jury purposes, thereby apparently indicating that, as to that tape, the President also made no particularized claim of privilege in the Grand Jury context.

\*\*/Respecting the President's repeated assertion that this case involves a "political question" and is thus non-justiciable, we respectfully refer the Court to our Court of Appeals recent decision in National Treasury Employees Union v. Nixon (D.C. Cir. No. 72-1929, Jan. 25, 1974), where a similar claim by the President in defense of a suit against him was rejected.

required by the decisions in this Circuit, all defendants will receive a fair and prompt trial. Against this background, the Special Prosecutor can say no more than that compliance with the subpoena might provide prospective defendants with one more discrete incident to cite in support of a claim of prejudicial pre-trial publicity. Accordingly, we take no position on whether the Court, if the Senate Select Committee subpoena is otherwise enforceable, should consider the danger of prejudicial pre-trial publicity a decisive factor."

The Special Prosecutor has candidly recognized that, in addition to a Court's powers to achieve fair trials,<sup>\*/</sup> there are several other factors that minimize the possibility of prejudice respecting any future trials if the Court orders compliance with the subpoena at issue. Thus he suggests (p. 4) that any possible impact would be reduced if the Committee uses the subpoenaed material judiciously. We represent to the Court that the Committee, ever cognizant of the need for fair trials, will voluntarily impose the necessary restrictions on itself as to the employment of this material. The Committee recently postponed scheduled hearings because of the proximity of the Mitchell/Stans trial in New York City and similar self-restraint will be shown in the future.<sup>\*\*/</sup>

The Spécial Prosecutor has stated (p. 5-6) that "any publicity stemming from compliance with the subpoenas would add only

<sup>\*/</sup>As Judge Sirica said in Application of United States Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1270, 1280 (D.D.C. 1973), a Court has a well-stocked arsenal of measures designed to preserve the integrity of proceedings and the rights of individuals". The existence of a "well-stocked arsenal" provides additional support for Justice Harlan's observation that a "legislative investigation need not grind to a halt whenever response to its inquiries might potentially be harmful to a witness in some distinct proceeding . . . or when crime or wrongdoing is disclosed". *Hutcheson v. United States*, 369 U.S. 599, 618, (1962) (Harlan, J. concurring). See also, *Delaney v. United States*, 199 Fed. 2d 107 (1st Cir. 1952).

<sup>\*\*/</sup>Because the Committee will handle the material it receives in judicious fashion, we see no reason for the Court to impose restraints as to how such materials may be used--a course that, in any event, would be of doubtful validity in view of separation of powers and comity considerations. E.g., Application of United States Senate Select Committee on Presidential Campaign Activities, 361 F. Supp. 1270, 1280 (D.D.C. 1973); *Sanders v. McClellan*, 150 U.S. App. D.C. 58, 463 F.2d 894 (1972).

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marginally to previous publicity" and has also noted the Court of Appeals' ruling that the tapes constitute "the best evidence of the conversations available". Nixon v. Sirica (p. 32). In this vein, we suggest to the Court that, because this "best evidence" would put speculation to rest as to what is on the tapes, the volume of publicity respecting the tapes would actually be reduced by revelation of their contents.\*/

There are yet other factors that would minimize the possible pretrial impact of producing the tapes to the Select Committee. It may be possible that many or all the Watergate cases will be resolved by guilty pleas. In such circumstances, any possible prejudice resulting from playing the tapes would be limited or non-existent.\*\*/ Moreover, the tapes may be played in the Impeachment proceedings (if the House Judiciary Committee is successful in obtaining them) or--if there are separate trials--at the first trial of a major White House figure. Any trials following those events would not be effected to any greater degree by production to the Committee of the materials subpoenaed.

In any event, it is not clear what future prosecutions might be prejudiced by playing the tapes or how they might be prejudiced. The Special Prosecutor forthrightly recognizes this (p. 4), stating "at this time it is impossible to

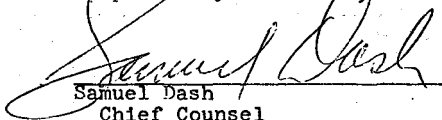
\*/We note, in this regard, the current, widely publicized dispute between the Special Prosecutor's office, on the one hand, and Mr. St. Clair, the President's Counsel, and Sen. Scott, on the other, as to the contents of the President-Dean conversations on September 15, 1972, February 28, 1973, and March 13, 1973--all of which are involved in this lawsuit. (See, e.g., Washington Post, Feb. 2, 1974, p. A-15, col. 1-4; Washington Star-News, Feb. 5, 1974, p. A-2, col. 2-5.)

\*\*/It is significant that guilty pleas have been obtained from Dean, Magruder, Porter, LaRue and Segretti even though they testified before the Committee and thus the facts of their activities were extensively publicized.

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assess the precise impact of such publicity on forthcoming trials".\*/ Surely, some vague, possible pretrial impact that may never occur does not outweigh the vital need of the Committee to achieve the tapes in question so it may fulfill its law-making and informing functions.\*\*

Respectfully submitted,



Sherman Cohn  
Eugene Gressman  
Jerome A. Barron  
Washington, D.C.  
Of Counsel

Arthur S. Miller  
Chief Consultant to  
the Select Committee  
Washington, D.C.  
Of Counsel

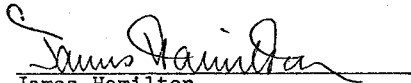
Samuel Dash  
Chief Counsel  
Fred D. Thompson  
Minority Counsel  
Rufus Edmisten  
Deputy Counsel  
James Hamilton  
Assistant Chief Counsel  
Richard B. Stewart  
Special Counsel  
Ronald D. Rotunda  
Assistant Counsel  
Donald S. Burris  
Assistant Counsel  
United States Senate  
Washington, D.C. 20510  
Tel. No. 225-0531  
Attorneys for Plaintiffs

\*/The most the Special Prosecutor would say (p. 3-4) is that "airing the recordings . . . would increase the risk that those indicted could contend with more force than presently available that widespread pre-trial publicity prevents the Government from empanelling an unbiased jury for the trial of the offenses charged". This statement could hardly be more cautious and guarded. And, as previously noted, the Special Prosecutor also stated (p. 6) that he is "confident that notwithstanding prior publicity, if jurors are selected with the care required by the decisions in this Circuit, all defendants will receive a fair and prompt trial".

\*\*/We accept the Special Prosecutor's suggestion that the Committee be supplied with only the copies of the five tapes it seeks, provided that it can verify their accuracy by comparing them with the originals in the Court's possession.

CERTIFICATE OF SERVICE

I, James Hamilton, do hereby certify that on the 7th of February, 1974, I served copies of the attached Plaintiffs' Observations on the President's Letter and the Special Prosecutor's Memorandum upon the defendant President and upon the Special Prosecutor by having said copies hand-delivered to the office of the President's Counsel in the Executive Office Building, Pennsylvania Avenue, Washington, D.C. and to the offices of the Special Prosecutor at 1425 K Street, N.W., Washington, D.C.



James Hamilton  
Assistant Chief Counsel  
United States Senate  
Washington, D.C. 20510

Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON  
PRESIDENTIAL CAMPAIGN ACTIVITIES,  
ET AL.,

Plaintiffs,

v.

RICHARD M. NIXON, individually  
and as President of the United  
States,

Defendant.

Civil Action No. 1593-73

MEMORANDUM AND ORDER

The Senate Select Committee on Presidential Campaign Activities desires access to five tape recordings made by the President of conversations between himself and John Wesley Dean, III, then Counsel to the President. These tapes are relevant to the Committee's functions and are identified by date and time. The Committee duly served a subpoena duces tecum on the President demanding production of those portions of the taped conversations which deal with "alleged criminal acts occurring in connection with the Presidential election of 1972."<sup>\*/</sup> The President refused to comply. Deeming the Senate's own enforcement procedures inappropriate, the Committee sought judicial enforcement of the subpoena, but the Court (Sirica, J.) ruled that it lacked jurisdiction. At the instance of the Committee, Congress then passed a Joint Resolution placing special jurisdiction in this Court to enforce the Committee's subpoenas, and accordingly the issues are again presented for judicial consideration. The Committee seeks a declaratory judgment clarifying its rights and an affirmative injunction directing compliance with the subpoena.

The Committee has moved for summary judgment and the President, through his counsel, resists and asks for dismissal.

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<sup>\*/</sup> The Committee originally issued two subpoenas duces tecum, but enforcement of the second subpoena was denied by this Court on January 25, 1974.

On the basis of the voluminous papers before the Court and a transcript of the oral argument before Judge Sirica during earlier proceedings in this case, the Court has determined that no further hearings are required and the case is ripe for resolution.

The President at the outset contends that the issue before the Court "constitutes a non-justiciable political question," but the decision of the United States Court of Appeals for the District of Columbia Circuit sitting en banc in Nixon v. Sirica, Nos. 73-1962, 73-1967, 73-1989/487 F.2d 700 (D.C. Cir. Oct. 12, 1973), is squarely to the contrary and no extended discussion is required. The reasoning of that Court involving a grand jury subpoena is equally applicable to the subpoena of a congressional committee. Baker v. Carr, 369 U.S. 186 (1962), establishes the tests for determining the existence of a "political question," and application of these tests leaves no doubt that the issues presented in the instant controversy are justiciable. See id. at 217. See also Powell v. McCormack, 395 U.S. 486, 518-50 (1969).

Given this determination, it becomes the duty of the Court to weigh the public interests protected by the President's claim of privilege against the public interests that would be served by disclosure to the Committee in this particular instance. Nixon v. Sirica, supra, at 716-18. This is a difficult but necessary task. The circumstances are unique in our constitutional history. To aid the final determination, the Court requested the Watergate Special Prosecutor to indicate what effect, if any, public disclosure of the subpoenaed tapes by the Committee at this juncture would have on his responsibilities in carrying forward criminal prosecutions. The Court also requested the President to particularize and to update his claim of privilege as it relates to the tapes, since substantial time and many events have intervened since the original issuance of the subpoena. The President's response is attached. The Committee has also elaborated upon its need for the tapes in recently filed papers. The Court has carefully

weighed these conflicting assertions of public interest in the light of the respective requirements of the parties.

It has not been demonstrated to the Court's satisfaction that the Committee has a pressing need for the subpoenaed tapes or that further public hearings before the Committee concerning the content of those tapes will at this time serve the public interest. Conversely, the Court rejects the President's assertion that the public interest is best served by a blanket, unreviewable claim of confidentiality over all Presidential communications, see Nixon v. Sirica, supra, at 719-20, and the President's unwillingness to submit the tapes for the Court's in camera ex parte inspection or in any other fashion to particularize his claim of executive privilege precludes judicial recognition of that privilege on confidentiality grounds. Cf. United States v. Burr, 25 Fed. Cas. 187 (Case No. 14,694), 192 (1807).

On the other hand, both the President and the Special Prosecutor have advanced another factor bearing upon the public interest which the Court finds to be of critical importance -- the need to safeguard pending criminal prosecutions from the possibly prejudicial effect of pretrial publicity.

At this juncture in the so-called Watergate controversy, it is the responsibility of all three branches of the Federal Government to insure that pertinent facts are brought to light, that indictments are fairly and promptly tried, and that any accusations involving the conduct of the President or others are considered in a dignified manner and dealt with in accordance with established constitutional processes. The President, the Congress and the Courts each have a mutual and concurrent obligation to preserve the integrity of the criminal trials arising out of Watergate. The public has been subjected to a mass of information that is both conflicting and uncertain in its implications. Clearly the public interest demands that the



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charges and countercharges engendered be promptly resolved by our established judicial processes. Thus the Court is compelled to weigh the effect that disclosure of the subpoenaed portions of these tapes might have upon criminal trials scheduled or soon to be scheduled on the calendar of this Court.

Three grand juries are now engaged on matters under the Special Prosecutor's jurisdiction. A number of indictments and informations have already been filed and more are expected by the end of this month. The cases will be promptly scheduled for trial. The first trial is set for April 1, with pretrial hearings later this month, at which Mr. Dean will testify. The Special Prosecutor has indicated to the Court his intention of introducing at least four of the five subpoenaed tapes into evidence at some of the trials. All five tapes are now in his possession, and at least four have been played before a grand jury.

No one can doubt that, should the President be forced to comply with the subpoena, public disclosure of these tapes would immediately generate considerable publicity. While it is impossible, as the Special Prosecutor points out, to assess the precise impact of such publicity on the forthcoming judicial proceedings, the risk exists that it would bolster contentions that unbiased juries cannot be impaneled for trial. This is, moreover, in the nature of a test case and should the Committee prevail, numerous additional demands might well be made.\*/

The President has a constitutional mandate to see that the laws are faithfully executed and should therefore quite properly be concerned with the dangers inherent in excessive pretrial publicity. That the President himself may be under suspicion does not alter this fact, for he no less than any other citizen is entitled to fair treatment and the presumption

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\*/ A sweeping subpoena seeking some 500 items has apparently been served on the President more recently, but it has not been brought into this litigation.

-5-

of innocence. The public interest does not require that the President should be forced to provide evidence, already in the hands of an active and independent prosecution force, to a Senate committee in order to furnish fuel for further hearings which cannot, by their very nature, provide the procedural safeguards and adversary format essential to fact finding in the criminal justice system. Congressional demands, if they be forthcoming, for tapes in furtherance of the more juridical constitutional process of impeachment would present wholly different considerations. But short of this, the public interest requires at this stage of affairs that priority be given to the requirements of orderly and fair judicial administration.

The Court wishes to emphasize the special circumstances of this particular case which support this conclusion. The five tapes at issue are sought principally for the light that they might shed on the President's own alleged involvement in the Watergate coverup. "[A]llegations involving the President" are among those specifically assigned to the Special Prosecutor for investigation and, if appropriate, for prosecution. The President has, however reluctantly, now provided the Special Prosecutor with all of the information he requires with regard to the five conversations at issue. The tapes themselves have been delivered to the grand juries; all the President's aides participating in the conversations have been permitted to testify under oath concerning the conversations, and the President has invoked neither his Fifth Amendment nor his attorney-client privilege with regard to any of the conversations or related materials he has furnished. To suggest that at this juncture the public interest requires pretrial disclosure of these tapes either to the Committee or to the public is to imply that the judicial process has not been or will not be effective in this matter. All of the evidence at hand is to the contrary.

The Committee's role as a "Grand Inquest" into governmental misconduct is limited, for it may only proceed in aid of Congress' legislative function. The Committee has, of course, ably served that function over the last several months, but surely the time has come to question whether it is in the public interest for the criminal investigative aspects of its work to go forward in the blazing atmosphere of ex parte publicity directed to issues that are immediately and intimately related to pending criminal proceedings. The Committee itself must judge whether or not it should continue along these lines of inquiry, but the Court, when its equity jurisdiction is invoked, can and should exercise its discretion not to enforce a subpoena which would exacerbate the pretrial publicity in areas that are specifically identified with pending criminal charges.

The Court recognizes that any effort to balance conflicting claims as to what is in the public interest can provide only an uncertain result, for ours is a country that thrives and benefits from factional disagreements as to what is best for everyone. In assigning priority to the integrity of criminal justice, the Court believes that it has given proper weight to what is a dominant and pervasive theme in our culture. To be sure, the truth can only emerge from full disclosure. A country's quality is best measured by the integrity of its judicial processes. Experience and tradition teach that facts surrounding allegations of criminal conduct should be developed in an orderly fashion during adversary proceedings before neutral fact finders, so that not only the truth but the whole truth emerges and the rights of those involved are fully protected.

Accordingly, the Court declares that, while the controversy presented is justiciable, the Select Committee has not established by a preponderance of the evidence that it is

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entitled at this particular time to an injunction directing the President to comply with its subpoena for the five tape recordings. The application of the President's counsel for dismissal of the complaint is granted, and the complaint is dismissed without prejudice.

SO ORDERED.

  
UNITED STATES DISTRICT JUDGE

February 8, 1974.

## THE WHITE HOUSE

WASHINGTON

February 6, 1974

Dear Judge Gesell:

I have been advised by Special Counsel to the President of the order issued by you on January 25, 1974, in which you solicited my personal response with reference to five specified taped conversations.

As indicated in the various briefs, pleadings and other papers filed in this proceeding, it is my belief that the issue before this Court constitutes a non-justiciable political question.

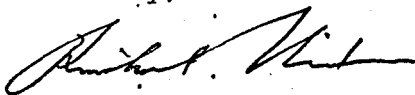
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I am taking this position for two primary reasons. First, the Senate Select Committee has made known its intention to make these materials public. Unlike the secret use of four out of five of these conversations before the grand jury, the publication of all of these tapes to the world at large would seriously infringe upon the principle of confidentiality, which is vital to the performance of my Constitutional responsibilities as President.

Second, it is incumbent upon me to be sensitive to the possible adverse effects upon ongoing and forthcoming criminal proceedings should the contents of these subpoenaed conversations be made public at an inappropriate time. The dangers

connected with excessive pre-trial publicity are as well-known to this Court as they are to me. Consequently, my Constitutional mandate to see that the laws are faithfully executed requires my prohibiting the disclosure of any of these materials at this time and in this forum.

Sincerely,

A handwritten signature in dark ink, appearing to read "Richard A. Posner". The signature is fluid and cursive, with a prominent initial "R" and a long, sweeping underline.

The Honorable Gerhard A. Gesell  
Judge  
U. S. District Court  
for the District of Columbia  
Washington, D.C.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SENATE SELECT COMMITTEE ON PRESIDENTIAL  
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Plaintiffs

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RICHARD M. NIXON,  
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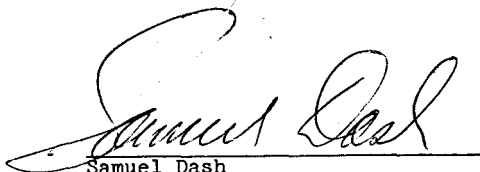
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JAMES F. DAVEY  
CLERK

Civil Action  
No. 1593-73

NOTICE OF APPEAL

Notice is given that the above named plaintiffs, this 20th day of February, 1974, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from this Court's Order of February 8, 1974, that denied plaintiffs' Motion for Summary Judgment and dismissed the complaint without prejudice.



Samuel Dash  
Chief Counsel  
Senate Select Committee on  
Presidential Campaign  
Activities  
United States Senate  
Washington, D.C. 20510  
(202) 225-0531

